

Erie as Nondelegation

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Despite its iconic status, Erie Railroad Co. v. Tompkins's constitutional basis is unknown. Indeed, because previous justifications for Erie are wanting, leading theorists have claimed that Erie has no constitutional basis at all. This Article challenges that view as profoundly mistaken. While previous accounts of Erie are indeed inadequate, Erie does have a constitutional basis: the nondelegation doctrine. Just as Congress cannot delegate unbridled power to the Executive Branch, Congress also cannot delegate unbridled power to the Judicial Branch. Building on that commonsensical premise, which is consistent with the Constitution's text and structure and which was endorsed by Chief Justice Marshall himself, this Article argues that Erie overruled Swift v. Tyson because Congress cannot constitutionally empower federal courts to govern the Nation's commercial law without providing an intelligible principle. Understanding Erie in nondelegation terms also explains the Supreme Court's more recent holding in Sosa v. Alvarez-Machain, which relied on Erie to read the Alien Tort Statute narrowly. Just as Congress cannot delegate broad authority to the federal courts to govern the Nation's internal commerce, Congress cannot delegate broad authority to the federal courts to govern the Nation's foreign affairs. Finally, because Erie, properly understood, holds that the nondelegation doctrine applies to the Judicial Branch, this Article observes that the Sherman Act may be constitutionally problematic as applied.

TABLE OF CONTENTS

I. INTRODUCTION	240
II. <i>ERIE</i> AND THE QUEST FOR JUSTIFICATION	245
A. <i>Setting the Stage: Swift v. Tyson</i>	248
B. <i>Changing the Law: Erie Railroad Co. v. Tompkins</i>	250
C. <i>Why Previous Accounts of Erie's Constitutional Basis are Inadequate</i>	253
1. <i>Equal Protection and Legal Positivism</i>	254
2. <i>Enumerated Powers</i>	256
3. <i>The Supremacy Clause</i>	260
4. <i>Another Constitutional Basis Is Required for Erie</i>	261

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III. <i>ERIE</i> AS NONDELEGATION	262
A. <i>The Nondelegation Doctrine</i>	263
1. <i>The Nondelegation Doctrine Logically Applies to Both the Executive and Judicial Branches</i>	266
2. <i>History Confirms that the Nondelegation Doctrine Applies to Courts</i>	268
3. <i>Why Courts Are Reluctant to Enforce the Nondelegation Doctrine</i>	271
4. <i>Enforcing Nondelegation Values Through Statutory Construction</i>	273
B. <i>Reading Erie as a Nondelegation Case</i>	275
1. <i>Reading Erie as a Nondelegation Case Makes Sense at a "Micro" Level</i>	276
2. <i>Reading Erie as a Nondelegation Case Makes Sense at a "Macro" Level</i>	279
3. <i>Did the Supreme Court Intend to Issue a Nondelegation Decision in Erie?</i>	282
4. <i>Possible Objections to Reading Erie as a Nondelegation Decision</i>	284
IV. <i>SOSA V. ALVAREZ-MACHAIN</i> AS NONDELEGATION	288
V. <i>ERIE</i> AND THE SHERMAN ACT	296
VI. CONCLUSION	301

I. INTRODUCTION

Consider this counterfactual. It is 1938. To facilitate interstate trade, Congress has passed the National Uniformity Act (NUA), which empowers the President to issue "codes of uniform law" to govern commercial law disputes so long as a state has not enacted its own statutory law. Though the NUA instructs the President to create these "general" rules, it contains no guidance concerning what they should say. A Pennsylvania citizen sues a New York corporation and wins under these "codes of uniform law." Citing the recently decided *A.L.A. Schechter Poultry Corp. v. United States*¹ and *Panama Refining Co. v. Ryan*,² the corporation appeals to the U.S. Supreme Court, arguing that Congress cannot delegate to the President that much authority over the Nation's economy with no intelligible principle. The Court agrees. After all, the effect of the NUA on the national economy is comparable to that of the National Industrial Recovery Act (*Schechter*

¹ 295 U.S. 495 (1935).

² 293 U.S. 388 (1935).

Poultry),³ and the NUA contains no intelligible principle (*Panama Refining*),⁴ so the NUA must fall too. In 2000, Cass Sunstein quipped that “the conventional nondelegation doctrine has had two good years and more than 210 bad ones.”⁵ And administrative law rolls on.

Now return to the real world. In 1938, the Supreme Court *did* make a constitutional holding similar to the one set out in this counterfactual. Pursuant to delegated power, a branch of government other than Congress was exercising unconstrained authority to create vast amounts of law with profound effects on the national economy. The Supreme Court held that federal policy must be “governed . . . by Acts of Congress,”⁶ and without congressional guidance there is no valid federal law. This constitutional holding sits well with *Schechter Poultry* and *Panama Refining*, two cases decided three years earlier by essentially the same Court. That 1938 case, of course, was *Erie Railroad Co. v. Tompkins*.⁷ But despite being one of the most discussed cases in American law, *Erie* is not understood as a nondelegation opinion in the same vein as *Schechter Poultry* and *Panama Refining*. That should change.

To be sure, *Erie* is different from *Schechter Poultry* and *Panama Refining*. Those well-known nondelegation cases involved delegations to the Executive Branch, while *Erie* addressed a delegation to the Judicial Branch. But is that distinction decisive? Ask yourself this question: Could “Members of Congress even if they wished, vote all power to the federal courts and adjourn *sine die*”?⁸ To ask is to answer. At some point the judicial power—like the executive power—must “run out” because the delegated authority is just too great for the power exercised to be anything but purely legislative. Building on that commonsensical premise, the question then is not whether the nondelegation doctrine can apply to courts, but instead whether *Erie* was a case where the judicial power had run out. In light of the broad, unchanneled power exercised by federal courts under *Swift v. Tyson*’s⁹

³ Cf. *Schechter Poultry*, 295 U.S. at 548–50.

⁴ Cf. *Pan. Ref.*, 293 U.S. at 429–30 (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

⁵ Cf. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (“[T]he conventional doctrine has had one good year, and 211 bad ones (and counting).”).

⁶ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

⁷ *Erie*, 304 U.S. 64.

⁸ Cf. *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (“Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.”).

⁹ 41 U.S. (16 Pet.) 1 (1842).

interpretation of the Rules of Decision Act,¹⁰ *Erie* indeed can and should be understood as a nondelegation case.

There is deep confusion concerning *Erie*'s constitutional basis, including whether there even is one at all. While previous accounts of *Erie*'s constitutional footing are indeed flawed, this Article offers a new constitutional justification: the nondelegation doctrine. Thus, properly understood, *Erie* does not sound in the Commerce Clause, the Equal Protection Clause, the Due Process Clause, the Tenth Amendment, the Supremacy Clause, an Article III rejection of all federal common law, or some meta-concern about legal positivism. Nor was *Erie* wrongly decided. Instead, *Erie* is constitutionally correct for the simple reason that pursuant to the nondelegation doctrine, Congress cannot hand off power to create law governing broad swaths of the national economy with no intelligible principle to guide that law's creation—no matter which branch is Congress's delegate.

Accordingly, this Article's central claim is that the Rules of Decision Act as interpreted by *Swift* was unconstitutional because if federal courts are given the undirected power to create law in diversity cases in which a state statute does not resolve the question (as they could under the *Swift* regime),¹¹ then that is too much power over too much of the American economy for Congress to give away. *Erie*, thus, was right to bring the *Swift* regime to an end. Importantly, there are hints in *Erie* that the Supreme Court intended to issue a nondelegation decision.¹² But more important still, because the nondelegation doctrine explains *Erie* while no other constitutional basis does, *Erie* can and should be read in nondelegation terms, even if the nondelegation doctrine was not expressly on the *Erie* Court's mind.

The doctrinal advantages that result from characterizing *Erie* as a nondelegation case are apparent. First, at a "micro" level, it fits *Erie* well. It is no secret that many of the explanations for *Erie* as a *doctrine* do not actually explain *Erie* as a *case*. Indeed, some of the justifications given for *Erie* are irreconcilable with the facts in *Erie* and the general context of law when *Erie* was decided. *Erie*, for instance, cannot be an equal protection case because the Equal Protection Clause was not held to apply to the federal government until more than a decade after *Erie* was decided.¹³ Nor does *Erie* sit comfortably as a Commerce Clause case. Even under a narrow conception of the Commerce Clause, Congress can regulate tort liability for accidents

¹⁰ Federal Judiciary Act, § 34, 1 Stat. 73, 92 (1789).

¹¹ See Craig Green, *Repressing Erie's Myth*, 96 CAL. L. REV. 595, 600 (2008).

¹² See discussion *infra* Part III.B.3.

¹³ Green, *supra* note 11, at 603 (citing *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954)).

involving interstate trains—which was the factual situation in *Erie*.¹⁴ And the Tenth Amendment is a nonstarter. If the Tenth Amendment is just the inverse of Congress's enumerated powers, then it falls with the Commerce Clause; if the Tenth Amendment is a stand-alone argument, then reading *Erie* as a Tenth Amendment case does not jibe with precedent.¹⁵ Understanding *Erie* as a nondelegation decision avoids these doctrinal problems.

Second, at a “macro” level, characterizing *Erie* as a nondelegation decision sidesteps some of the more extreme implications for other doctrines that have been drawn from *Erie*—implications that, if followed, would needlessly upset a great deal of law. On the one hand, for instance, some suggest that *Erie* makes *all* federal common law inherently suspect.¹⁶ If that were true, a lot of law would have to go. Understanding *Erie* as a nondelegation case avoids that problem. Just as most agency action will not be struck down as unconstitutional even though law is being made in the “executive” process, most federal common law will not be struck down as unconstitutional even though law is being made during the “judicial” process. It is only when the delegation goes so far that the executive or judicial power runs out that the offending statute cannot stand. This is not an easy line to draw, but precedent is plain that there *is* a line.¹⁷ In other words, federal common law is not categorically unconstitutional, but there are meaningful limits.

On the other hand, but equally extreme, it has recently been argued that *Erie* should have no precedential value whatsoever outside of “federal courts deciding legal issues commonly heard in state court.”¹⁸ Under this theory, the Supreme Court's cases that have extended *Erie* to new areas of law should be uprooted as constitutionally unsound. But this view of *Erie* is also mistaken. Because *Erie* should be understood as a nondelegation decision, *Erie* is more than just a ticket good for one ride only. Instead, the Supreme Court has quite properly extended *Erie* into other contexts, such as customary international

¹⁴ *Id.* at 612.

¹⁵ *See id.* at 606–14.

¹⁶ *E.g., id.* at 597 (“[O]ne strand of scholarship claims that any federal common law that survived *Erie* is categorically suspect . . .”); *see also* George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—A (New) Erie Problem?*, 12 PACE L. REV. 229, 241 (1992) (“The key theme . . . is that doubts about federal judicial lawmaking reflect concerns of separation of powers. . . . New *Erie* . . . explain[s] why federal common law is suspect.”).

¹⁷ *See* discussion *infra* Part III.A.2.

¹⁸ *See, e.g.,* Green, *supra* note 11, at 614 (“I have no wish to unsettle the case in its original and classic contexts My goal in criticizing only the constitutional basis of *Erie*’s ‘old myth’ is to foreclose the decision’s expansion beyond its proper scope . . .”).

law.¹⁹ Indeed, *Erie* arguably should be extended even further still into other areas of law, such as antitrust, that also may pose nondelegation concerns.

But perhaps the most important “macro” benefit that results from understanding *Erie* as a nondelegation decision is that our constitutional structure is vindicated. The Constitution created each of the three branches of government for different reasons. Significantly, Congress alone is entrusted with legislative powers because Congress alone is institutionally designed to use them well, and, equally significant, because Congress is uniquely restrained in its ability to abuse them. Understanding *Erie* in nondelegation terms preserves the constitutional demarcation between the powers of Congress and the powers of the federal courts. Simply put, *Swift* had to go because it is not the federal Judiciary’s constitutional role to decide the hard policy questions that are inherent in creating a national code of commercial law. Congress, *and only Congress*, can do that.

This Article will proceed as follows. In Part II, this Article, following on the work of Professor Craig Green and many others, will set out *Erie* and address why traditional accounts of *Erie*’s constitutional basis are flawed. Professor Green is right that because the conventional justifications for *Erie* are unsound, *Erie* should not be extended until we have a better understanding of the principle that we are extending. As Professor Green well explains, with constitutional law at stake, the blind must not lead the blind.²⁰

This Article breaks new ground, however, in Part III. Scholars have not squarely assessed the nondelegation doctrine as a constitutional basis of *Erie*. Part III will introduce the nondelegation doctrine, explain how it applies in the context of delegations to the Judiciary, and show why this doctrine offers an excellent account for *Erie*’s holding. The core of the nondelegation doctrine—the notion that “the basic policy decisions governing society are to be made by the Legislature”²¹—can and should be applied to delegations to *both* the Executive and Judicial Branches. Indeed, no less authority than Chief Justice Marshall expressly explained that delegations to the Judiciary are unconstitutional if the power being given is “strictly and exclusively legislative.”²² *Erie* was such a case. Reading *Erie* as a nondelegation opinion

¹⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004) (relying on *Erie* in the context of the Alien Tort Statute).

²⁰ See Green, *supra* note 11, at 614.

²¹ *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

²² *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (Marshall, C.J.).

explains why most federal common law is constitutional, while at the same time demonstrating why *Erie* can be applied outside of the diversity context.

Part IV then sets out why reading *Erie* as a nondelegation case also explains *Sosa v. Alvarez-Machain*.²³ In his critique of *Erie*'s application outside of the diversity context, Professor Green presents *Sosa* as Exhibit One.²⁴ But if *Erie* is a nondelegation case, then *Sosa* makes sense too. There are real nondelegation concerns posed by the Alien Tort Statute. Because customary international law is nebulous, it would be an expansive delegation of authority to empower Article III courts to decide what abstract customary international law principles actually mean in practice and which causes of action to recognize. So, in *Sosa*, the Supreme Court imposed limiting principles on the reach of the statute²⁵—an interpretative move that is common in nondelegation cases.²⁶

Finally, Part V will address the Sherman Act—a chief piece of evidence often offered for the notion that unbridled federal common law is constitutional.²⁷ But this may be exactly backwards. While the Sherman Act might suggest that *Erie* should not be regarded as a nondelegation case, the Sherman Act can also be seen as the next target of *Erie* as a nondelegation case. In other words, the doctrinal tension arguably should be resolved by extending *Erie* into the antitrust context, just as it has been extended into the customary international law context. Because the nondelegation doctrine applies to the Judiciary, the way antitrust law has developed potentially may be difficult to defend.²⁸

II. *ERIE* AND THE QUEST FOR JUSTIFICATION

We start on familiar but surprisingly unstable ground: *Erie Railroad Co. v. Tompkins*. *Erie*, of course, is more than just a case—it is an “icon.”²⁹ There are reasons for this iconic status. First, unlike some theoretically fascinating legal questions that thankfully just don't come up all that often (if

²³ 542 U.S. 692 (2004).

²⁴ See Green, *supra* note 11, at 598.

²⁵ See *Sosa*, 542 U.S. at 732.

²⁶ See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 244–46 (2001).

²⁷ See, e.g., Green, *supra* note 11, at 619–20 (“[J]udicial doctrine [in the antitrust context] often looks much like common law.”).

²⁸ See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 436 (2008); Andrew S. Oldham, *Sherman's March (in)to the Sea*, 74 TENN. L. REV. 319, 324 (2007).

²⁹ See Green, *supra* note 11, at 595.

ever)³⁰ or are purely academic,³¹ or even pedantic,³² *Erie* is invoked daily by the courts.³³ Second, *Erie* is the product of Justice Brandeis,³⁴ who was finishing the work of Justice Holmes;³⁵ *Erie*'s most able defender is Judge Friendly;³⁶ and *Erie* overturned *Swift v. Tyson*, the handiwork of Justice Story.³⁷ That is a murderers' row of judges. Third, *Erie* makes bold (indeed, "hyperbolic"³⁸) declarations about what law is and what it is not³⁹—the sort of categorical claims that keep people talking.⁴⁰ And finally, *Erie* is a

³⁰ See, e.g., Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 113 (1995) (arguing that it is unconstitutional for members of Congress to be in the presidential line of succession); Brian C. Kalt, *The Perfect Crime*, 93 GEO. L.J. 675, 677–78 (2005) (arguing that crime committed in non-Wyoming portions of Yellowstone National Park may escape punishment).

³¹ See, e.g., David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 466 (1983) (discussing which historical justice is the most insignificant); Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 293 (2002) (discussing whether West Virginia was properly admitted to the United States, a question that has surely been settled for all practical purposes).

³² See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) ("[M]any 'elite' law faculties in the United States now have significant contingents of 'impractical' scholars The 'impractical' scholar—that is the term I will use—produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner.").

³³ According to WestlawNext, *Erie* itself was cited in at least 1870 cases from 2006 to 2008. *Erie* R.R. Co. v. Tompkins KeyCite Citing References, WestlawNext, <https://next.westlaw.com> (search for "304 U.S. 64"; then click "Citing References"; then narrow to "Cases" and a date range of 2006–2008). This measure, of course, significantly undercounts the number of times the *Erie* doctrine has been applied because *Erie* is so well-known that it often need not be cited at all. Just as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is not cited in every case in which judicial review is invoked, *Erie* is not mentioned in every case in which state law is applied when a federal court is sitting in diversity.

³⁴ *Erie* R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (Brandeis, J.).

³⁵ See *id.* at 79 ("The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes.").

³⁶ See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

³⁷ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (Story, J.).

³⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (2004) (Scalia, J., concurring).

³⁹ See, e.g., *Erie*, 304 U.S. at 79 (rejecting the notion of "a transcendental body of law").

⁴⁰ *Erie* is one of the top ten most cited cases of all time. See Shane Marmion, *Most-Cited U.S. Supreme Court Cases in HeinOnline—Part II*, HEINONLINE BLOG (Feb. 16, 2009) <http://home.heinonline.org/blog>. According to Marmion's count, *Erie* has been

constitutional case, and so is meant to last for the ages. With that background, it is no surprise that *Erie* enjoys a prominent place in American law.⁴¹

But for all of that, *Erie*'s constitutional basis is draped in confusion.⁴² In one sense, of course, *Erie* is settled. The Supreme Court's black-letter holding—that, in diversity cases, the federal court applies the law of the state in which it sits—is applied all the time. But despite boasting such a recognizable holding, *Erie*'s constitutional basis is famously opaque,⁴³ reflecting the uncomfortable truth that *Erie*'s majority opinion at times seems more like a Rorschach ink blot than reasoned analysis.⁴⁴ The Supreme Court made a constitutional holding—in fact, the Court overturned nearly a century of law based on that constitutional holding—but it failed to specify the constitutional basis of that holding.⁴⁵ This is a serious problem for *Erie* as a judicial doctrine because *Erie* must itself be understood *before* it can properly be applied in new contexts like customary international law.⁴⁶

Indeed, the foundational principle that Supreme Court decisions must be understandable goes to the very heart of the Judicial Branch. “[Courts] command no army . . . [and] hold no purse. The only thing [they] have to enforce [their] judgments is the power of [their] words.”⁴⁷ Thus, there must be doctrine—“each legal decision should be referable to a rule or principle.”⁴⁸ After all, “[w]e want courts—and the Supreme Court is above

cited in scholarly journals more than 8,000 times, which is more than *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (6,835 times), *Lochner v. New York*, 198 U.S. 45 (1905) (7,299 times), and *Plessy v. Ferguson*, 163 U.S. 537 (1896) (6,926 times). See Marmion, *supra*.

⁴¹ Cf. Marion O. Boner, *Erie v. Tompkins: A Study in Judicial Precedent: II*, 40 TEX. L. REV. 619, 635 (1962) (“Like a religion, *Erie* has accumulated a fringe of extremists, cultists and fanatics; like a religion too, it has its dissenters and protestants.”).

⁴² See Green, *supra* note 11, at 596.

⁴³ See *id.* at 596 n.4 (listing authorities that characterize *Erie*'s reasoning as “remarkably abbreviated,” “murky,” and “uncertain[.]”).

⁴⁴ See, e.g., *id.* at 603–18 (listing different interpretations of *Erie*).

⁴⁵ See, e.g., Herbert Hovenkamp, *Federalism Revised*, 34 HASTINGS L.J. 201, 206 (1982) (reviewing TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM (1981)) (“[*Erie*] is famous for ruling that in diversity cases federal judges must apply the relevant state law and not some body of ‘general common law.’ It is almost as famous for basing that decision on an uncertain constitutional principle” (footnote omitted)).

⁴⁶ Cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004).

⁴⁷ *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1100 (9th Cir. 2006) (Bybee, J., dissenting).

⁴⁸ CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 2 (2004).

all a court—to be bound by rules and principles,”⁴⁹ because without such doctrine, constitutional law is not “law” in any meaningful sense—it’s just “a set of political decisions made by politicians.”⁵⁰ This is true for all cases, but especially for extraordinarily important ones like *Erie* that, by their very nature, bleed beyond their facts.⁵¹

A. *Setting the Stage*: *Swift v. Tyson*

The story of *Erie* is well-known. In 1789, Congress enacted Section 34 of the First Judiciary Act—the Rules of Decision Act. In it, Congress mandated “[t]hat the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”⁵² The two interpretations given by the Supreme Court to this short sentence of statutory language have had resounding repercussions for American constitutional law.

First, the “villain.”⁵³ In 1842, the Supreme Court decided *Swift v. Tyson*. This commercial law case concerned a bill of exchange and assignments. As explained by Professor Herbert Hovenkamp:

[T]he question for decision was whether Swift, the holder of a bill of exchange, was a holder in due course entitled to collect on the bill in spite of a failure of consideration in the land transaction upon which the bill was based. The general commercial law said that he could. New York decisional law probably said that he could not. Justice Story applied the general commercial law.⁵⁴

To reach that conclusion, Justice Story had to confront the Rules of Decision Act. Story succinctly “rejected the argument that section 34 required him to apply New York decisional law” because “[t]he word ‘laws’ in section 34 . . . refers to the ‘rules and enactments promulgated by the legislative authority’ of a sovereign.”⁵⁵ Story reasoned that “[i]n the ordinary

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Green, *supra* note 11, at 602 (explaining the “iconic” role *Erie* plays in American law). There is a reason, of course, why important cases inevitably creep into new areas of law: “[T]he great majority of men”—including lawyers—“live like bats, but in twilight, and know . . . the philosophy [and law] of their age only by its reflections and refractions.” SAMUEL TAYLOR COLERIDGE, 3 ESSAYS ON HIS OWN TIMES 708 n.* (1850).

⁵² Federal Judiciary Act, § 34, 1 Stat. 73, 92 (1789).

⁵³ Green, *supra* note 11, at 600.

⁵⁴ Hovenkamp, *supra* note 45, at 204.

⁵⁵ *Id.* at 205 (quoting *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842)).

use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws.”⁵⁶ Thus, the *Swift* Court held that “section 34 did not apply to the judicial decisions of state courts interpreting the common law. A federal court deciding a diversity case was not statutorily obligated, therefore, to follow the common law of a state as it would be applied if the case were in state court.”⁵⁷

Justice Story also presented another rationale for the Court’s conclusion:

In all the various cases which have hitherto come before us for decision, this Court have [sic] uniformly supposed, that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state It never has been supposed by us, that the section . . . was designed to apply[] to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation⁵⁸

These “‘strictly local’ [laws] . . . included ‘rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character.’”⁵⁹ But, “[i]n the category of laws of a more ‘general nature,’ the Justice included ‘the construction of ordinary contracts or other written instruments, and especially . . . questions of general commercial law’”⁶⁰

Significantly, however, Justice Story was *not* making “a constitutional decision” in *Swift*.⁶¹ His decision was wholly statutory.⁶² He read the Rules

⁵⁶ *Swift*, 41 U.S. (16 Pet.) at 18; see also Hovenkamp, *supra* note 45, at 205.

⁵⁷ Hovenkamp, *supra* note 45, at 205.

⁵⁸ *Swift*, 41 U.S. (16 Pet.) at 18–19; see also Hovenkamp, *supra* note 45, at 205.

⁵⁹ Hovenkamp, *supra* note 45, at 205 (quoting *Swift*, 41 U.S. (16 Pet.) at 18).

⁶⁰ *Id.* at 205–06 (quoting *Swift*, 41 U.S. (16 Pet.) at 18) (second alteration in original).

⁶¹ *Id.* at 204–05 (“It is important initially to recognize that for Justice Story *Swift* was not a constitutional decision. It never occurred to him that article III, section 2 of the Constitution, which extends the judicial power of the United States to controversies ‘between Citizens of different States,’ had anything to do with choice-of-law questions in diversity cases.”).

⁶² It is worth noting that there may have been sound policy reasons for that decision:

Swift enabled litigants and judges to determine the proper division of power between states and federal government at a time when states were insular, parochial, inclined to view themselves as small nations, and when the United States was struggling to assert its national authority both internally and against the world.

Id. at 215. If the purpose of diversity jurisdiction was to protect commerce, e.g., Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 499 (1928) (“Not unnaturally the commercial interests of the country were reluctant to expose themselves to the hazards of litigation before such courts as these.”), then *Swift* may have

of Decision Act to mean that unless a state statute was on point, the federal courts themselves could “express [their] own opinion of the true result”—i.e., the legal rule—that should govern.⁶³ In other words, Justice Story held that the word “laws” in Section 34 should be read narrowly to include only state statutory laws, and, importantly for our purposes, he necessarily found that Section 34 is an implicit delegation of power to the federal Judiciary to create general common law.⁶⁴

B. *Changing the Law*: Erie Railroad Co. v. Tompkins

The *Swift* regime screeched to a halt in *Erie*. “Every law student knows the facts of *Erie R.R. v. Tompkins* and can recite them from memory.”⁶⁵ At 2:30 A.M. on July 27, 1934, Harry Tompkins, “a citizen of Pennsylvania,” was walking home along the train tracks and “was injured . . . by a passing freight train of the Erie Railroad Company.”⁶⁶ Tompkins sued in federal court in New York, where the railroad had citizenship,

claim[ing] that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten footpath which ran for a short distance

helped effectuate that purpose. See Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1613–21 (2003) (explaining why the *Swift* regime likely produced better law than the *Erie* regime). But sound policy is not always good law.

⁶³ *Swift*, 41 U.S. (16 Pet.) at 19; see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71 (1938) (“[Under *Swift*,] federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is—or should be . . .”).

⁶⁴ It is possible that Justice Story assumed federal courts have the power to craft general common law because of the grant of diversity jurisdiction in Article III itself. We do not know how Justice Story conceived of Article III in *Swift*—because he did not mention it. In fact, Justice Story did not make a constitutional argument at all. See Hovenkamp, *supra* note 45, at 204–05. Note also that there is an argument that *Swift* itself was rightly decided because “state and federal courts alike considered questions of general commercial law at the time to be governed by the law merchant, a branch of the law of nations,” but that federal courts misapplied *Swift*’s holding after the fact. See Bradford R. Clark, *Erie’s Constitutional Source*, 95 CAL. L. REV. 1289, 1291–94 (2007). For purposes of this Article, it is enough to say that by the time *Erie* was decided, federal courts were interpreting the Rules of Decision Act as a broad, implicit delegation of policymaking power in diversity suits.

⁶⁵ Hovenkamp, *supra* note 45, at 204. Alas, Professor Hovenkamp’s statement is not entirely true. The author has it on excellent authority that one can graduate from Yale Law School without ever being taught *Erie*.

⁶⁶ *Erie*, 304 U.S. at 69.

alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars.⁶⁷

The railroad disputed the claim, arguing that under Pennsylvania law, “persons who use pathways along the railroad right of way—that is a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or wilful.”⁶⁸ Tompkins responded, quite sensibly, that in the absence of state statutory law “the railroad’s duty and liability is to be determined in federal courts as a matter of general law.”⁶⁹ The basis for that argument was the “oft-challenged doctrine of *Swift v. Tyson*.”⁷⁰

The Supreme Court granted certiorari, and, with Justice Brandeis writing, overruled *Swift*’s interpretation of the Rules of Decision Act—even though neither party had challenged *Swift* nor asked that it be overruled.⁷¹ Thus, while the case before it was not briefed or argued in such overarching terms, the *Erie* Court nonetheless held that

[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.⁷²

The matter was remanded to address the state law claims.⁷³ *Swift* was done.

The *Erie* Court gave a number of reasons why *Swift* had to go. Preeminent was a policy argument: “Justice Brandeis’s majority opinion first condemned *Swift*’s interpretation of the Rules of Decision Act] as unworkable.”⁷⁴ The Supreme Court explained that

[e]xperience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering

⁶⁷ *Id.*

⁶⁸ *Id.* at 70.

⁶⁹ *Id.*

⁷⁰ *Id.* at 69; see also Green, *supra* note 11, at 600 & n.26 (noting criticisms of *Swift*).

⁷¹ *Erie*, 304 U.S. at 71.

⁷² *Id.* at 78.

⁷³ *Id.* at 80.

⁷⁴ Green, *supra* note 11, at 601.

a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.⁷⁵

These practical problems, combined with forum shopping,⁷⁶ prodded the Supreme Court to overthrow the *Swift* regime.

But the Supreme Court also gave more legalistic arguments for its aggressive opinion. The *Erie* Court observed, for instance:

[M]ore recent research of a competent scholar, who examined the original document [i.e., an early draft of the Rules of Decision Act], [has] established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.⁷⁷

⁷⁵ *Erie*, 304 U.S. at 74 (footnotes omitted). It should be noted, however, that experience in applying *Erie* has also revealed serious conceptual defects, and it is sometimes impossible to apply *Erie* in a satisfactory way. See Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 695-715 (1995) (laying out the conceptual difficulties inherent in making *Erie* predictions); see, e.g., *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.) ("Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought.").

⁷⁶ See Green, *supra* note 11, at 601 n.28 ("Criticism of the [*Swift*] doctrine became widespread' as increasingly flagrant forum shoppers escaped unfavorable state common law by invoking federal diversity jurisdiction." (citing *Erie*, 304 U.S. at 71-76)). According to Professor Green, the Supreme Court would have done well to have relied exclusively on these pragmatic grounds to justify why *Swift* had to be overruled, without mentioning any constitutional argument at all. See *id.* at 614-15 ("Every year, Civil Procedure classes explain and justify *Erie* as a rule that avoids disparities and forum shopping, while barely noting the decision's constitutional basis. This Article supports that approach, and would take the added step of jettisoning such constitutional arguments altogether."). But *Erie* does have a constitutional basis: the nondelegation doctrine.

⁷⁷ *Erie*, 304 U.S. at 72-73 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923)). In particular, Professor Warren discovered an earlier draft of the statute which, in his view, suggested that *Swift* was mistaken because the reference to "laws of the several States" in the Rules of Decision Act was a stylistic "abbreviation" of the phrase "the Statute law of the several States in force for the time being and their unwritten and common law now in use, whether by adoption from the common law of England, the ancient statutes of the same, or otherwise." Friendly, *supra* note 36, at 389. This scholarship is open to question. See, e.g., Hovenkamp, *supra* note 45, at 207 ("Warren suggested that if Justice Story had known in 1842 about this draft, *Swift v. Tyson* would have been decided the other way. As some scholars have noted, however, the inferences to be drawn from Ellsworth's original draft do not necessarily point in that direction." (footnote omitted)). In any event,

Importantly, however, *Erie*'s interpretation of the Rules of Decision Act and the Supreme Court's rejection of *Swift* did not rest on these statutory grounds alone, nor could they. As Justice Brandeis frankly acknowledged, because of stare decisis, "[i]f only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the *unconstitutionality* of the course pursued has now been made clear and compels us to do so."⁷⁸ In other words, *Erie*'s interpretation of the Rules of Decision Act was explicitly driven by constitutional analysis. *Swift* was not just wrong; it was unconstitutional, too. Indeed, "[i]t is *Erie*'s constitutional holding that has sustained the case's iconic status through the years."⁷⁹

C. Why Previous Accounts of Erie's Constitutional Basis are Inadequate

Unfortunately,⁸⁰ Justice Brandeis failed to specify *why* *Swift*'s interpretation was unconstitutional.⁸¹ This is a serious problem, because

[o]n an issue of construction alone, it was not decisive in 1938 whether or not an historian had discovered that in 1789 Ellsworth had meant, or even that the first Congress had meant, something different from what Story, in 1842, had ruled they meant. If ever Congress' reenactment of a statute or failure to alter it could fairly be taken as approving a prior judicial interpretation, the unchanged existence of section 34 for a century after Story's construction was such a case.

Friendly, *supra* note 36, at 390 (footnote omitted).

⁷⁸ *Erie*, 304 U.S. at 77–78 (emphasis added) (footnote omitted).

⁷⁹ Green, *supra* note 11, at 602.

⁸⁰ Professor Hovenkamp's critique of *Erie* is as cutting as it is understated. See, e.g., Hovenkamp, *supra* note 45, at 206 n.32 ("Justice Brandeis's statement in *Erie* that the 'course pursued' in federal courts in diversity cases after *Swift v. Tyson* was unconstitutional has prompted a great deal of comment, *largely because Brandeis neglected to mention which part of the Constitution he was referring to.*" (emphasis added)). But even this criticism is too kind. The *Erie* Court deserves no "praise" for issuing an opaque, poorly-explained constitutional decision. Justice Butler was entirely correct on this point:

This Court has often emphasized its reluctance to consider constitutional questions, and that legislation will not be held invalid as repugnant to the fundamental law if the case may be decided upon any other ground. In view of grave consequences liable to result from erroneous exertion of its power to set aside legislation, the Court should move cautiously, seek assistance of counsel, act only after ample deliberation, show that the question is before the Court, that its decision cannot be avoided by construction of the statute assailed or otherwise, indicate precisely the principle or provision of the Constitution held to have been transgressed, and fully disclose the reasons and authorities found to warrant the conclusion of invalidity.

constitutional law is serious business.⁸² According to traditional accounts, in *Erie*, “[t]he Court stated several grounds for its decision: equal protection, legal positivism, and federalism.”⁸³ For reasons that will be explained below,⁸⁴ there are also hints of the nondelegation doctrine in *Erie*. But first let’s pause and see why previous accounts of *Erie* are flawed.

1. *Equal Protection and Legal Positivism*

We can make short work of two possible justifications for *Erie*: equal protection and legal positivism. Neither is even plausible.

To be sure, one reason *Erie* gave for overruling *Swift* was that *Swift* “rendered impossible equal protection of the law.”⁸⁵ And in a sense, of course, that was true: “*Swift* caused disparities between litigants in federal court and litigants in state court; the former were governed by federal general common law, the latter by state law.”⁸⁶ Justice Brandeis’s incantation of “equal protection” thus superficially sounds like a weighty argument. But upon reflection it is apparent that this reference to “equal protection” is

Erie, 304 U.S. at 87 (Butler, J., dissenting). Put differently, imagine if the Court in *Citizens United v. FEC*, 558 U.S. 50 (2010), had decided the constitutional question without briefing and without explication, and then you have *Erie*—except *Erie* really did overturn nearly “a century of law”! See, e.g., Mark Memmott, *If Alito Did Say ‘Not True’ About Obama’s Claim, He May Have Had a Point*, THE TWO-WAY: NPR’S NEWS BLOG (Jan. 28, 2010, 6:35 AM), http://www.npr.org/blogs/thetwo-way/2010/01/if_alito_did_say_not_true_about.html (noting that President Obama was mistaken to say that *Citizens United* overturned “a century of law”).

⁸¹ See, e.g., Green, *supra* note 11, at 602 (observing that *Erie*’s constitutional analysis contained “just three sentences of original reasoning”).

⁸² Cf. *Emily’s List v. FEC*, 581 F.3d 1, 31 (D.C. Cir. 2009) (Brown, J., concurring) (“Before reaching a constitutional question, a federal court should . . . consider whether there is a nonconstitutional ground for deciding the case, and if there is, dispose of the case on that ground. My colleagues duck this rule, preferring to summon the awesome power of *Marbury v. Madison*. But in their eagerness to play John Marshall, they do not follow him. The Great Chief Justice himself cautioned: ‘No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them,’ but if not, ‘a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.’” (citations omitted) (quoting *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558)) (internal quotation marks omitted)).

⁸³ See, e.g., Green, *supra* note 11, at 602.

⁸⁴ See discussion *infra* Part III.B.3.

⁸⁵ *Erie*, 304 U.S. at 75.

⁸⁶ Green, *supra* note 11, at 603.

“insignificant” as a statement of constitutional law.⁸⁷ As put by Professor Green:

When Brandeis wrote that disparate treatment based on litigants’ state citizenship denied “equal protection,” however, he spoke at most in a colloquial sense. *Erie* did not—and could not—reverse *Swift* as violating the constitutional equal protection. Until the 1954 desegregation case *Bolling v. Sharpe*, it was unclear whether even racial discrimination by the federal government violated equal protection [by reverse incorporation under the Fifth Amendment’s Due Process Clause]. *Bolling* was in no sense foreshadowed by *Erie*’s throwaway sentence about discrimination against diverse litigants.

Even under today’s broadened view of equal protection, the Constitution does not bar using different substantive rules in federal and state courts. Conventional choice of law analysis often applies different states’ substantive law based on the parties’ citizenship; such decisions do not implicate the racial, sexual, or fundamental-rights discrimination that today merits heightened scrutiny. Nor did *Swift*-era federal practice lack a rational basis; rather, *Swift*-era federal courts sought to apply better substantive law, which would clearly satisfy permissive modern scrutiny.⁸⁸

Moreover, “*Erie*’s reference to ‘equal protection’ appears in a preliminary section of the opinion describing the ‘political and social’ defects of the *Swift* doctrine rather than the section specifically addressing ‘the unconstitutionality of the course pursued.’”⁸⁹ This too strongly suggests that equal protection was not the constitutional basis for *Erie*.

Nor does *Erie*’s legendary invocation of legal positivism provide a sound constitutional foundation for *Erie*—at least by itself.⁹⁰ Famously, Justice “Brandeis quoted a Holmes dissent condemning *Swift*’s ‘fallacy’ that federal general common law was a ‘transcendental body . . . outside of any particular State but obligatory within it.’”⁹¹ *Erie* thus “is one of the United States Supreme Court’s most definitive statements of legal positivism.”⁹² But

⁸⁷ *Id.*

⁸⁸ *Id.* (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

⁸⁹ Clark, *supra* note 64, at 1299 (quoting *Erie*, 304 U.S. at 77–78).

⁹⁰ For reasons that are explained below, legal positivism is relevant if *Erie* is understood as a nondelegation case. See discussion *infra* Parts III.B.2, III.B.3. But it is not a sound basis in its own right.

⁹¹ Green, *supra* note 11, at 604 (alteration in original) (quoting *Erie*, 304 U.S. at 79); see also Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 674–75 (1998) (explaining why legal positivism does not explain or justify the *Erie* decision).

⁹² Hovenkamp, *supra* note 45, at 224.

“judicial lawmaking does not violate legal positivism” so long as positive law provides for it.⁹³ Critically, there *was* a statute in *Erie*: the Rules of Decision Act.⁹⁴ Accordingly, the *Swift* regime was grounded in positive law too: “As a constitutional argument, the Holmesian position [thus] turns a colorful phrase, but is short on substance.”⁹⁵

2. Enumerated Powers

The best traditional argument for *Erie* sounds in the principle of enumerated powers. This theory posits that under *Swift*, federal courts could make law in areas where Congress did not have the power to regulate, and so *Swift* was an unconstitutional exercise of power by the federal government vis-à-vis the States. This argument has the charm of at least being plausible. But again, upon reflection, this argument cannot withstand scrutiny—unless we accept that the *Erie* Court was blind to the facts before it.

The “case or controversy”⁹⁶ at issue in *Erie*—a tort involving an interstate train—was surely within Congress’s competence.⁹⁷ And even more fundamentally, if *Erie*’s constitutional ruling rests entirely on an enumerated powers justification, then it is a narrow ruling indeed. It would be open to Congress to amend the Rules of Decision Act to resurrect *Swift*, so long as it included a token reference to matters “in or affecting interstate commerce.” Properly understood, *Erie* is not so limited.

At first blush, *Erie* can be read as an enumerated powers case like *United States v. Lopez*⁹⁸ or *United States v. Morrison*.⁹⁹ The *Erie* Court, after all, was (rightly) concerned by *Swift*’s usurpation of state powers, noting that “Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts,” nor does any “clause in the Constitution purport[] to confer such a power upon the federal courts.”¹⁰⁰

This is a forceful claim. If Congress—the lawmaking branch—lacks the power to regulate in some field, then common sense says that Congress cannot give power to regulate that field to another branch. In other words,

⁹³ Green, *supra* note 11, at 605.

⁹⁴ To be sure, the Act may have been misinterpreted by *Swift* as a matter of statutory interpretation, but misreading a statute, assuming that *Swift* did misread the statute, does not somehow violate legal positivism.

⁹⁵ Green, *supra* note 11, at 604.

⁹⁶ See U.S. CONST. art. III, § 2, cl. 1.

⁹⁷ *Id.* art. I, § 8, cl. 3.

⁹⁸ 514 U.S. 549 (1995).

⁹⁹ 529 U.S. 598 (2000).

¹⁰⁰ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

this enumerated powers argument posits that because “[s]ome cases heard by federal courts under Article III and the diversity statute concern purely intrastate, noncommercial matters, which Congress could not regulate as interstate commerce or under other Article I powers,” *Swift* was unconstitutional because Congress cannot “expand federal legislative powers simply by shifting lawmaking duties to the courts.”¹⁰¹ Congress simply cannot give away more than it has.

Judge Friendly made this argument best. As he explained, if we were to imagine “an act of Congress depriving charities of immunity in tort,” most would agree “that such a statute is neither within any power enumerated in section 8 of Article I nor within the ‘necessary and proper’ clause insofar as that relates to implementing Congress’ enumerated powers.”¹⁰² The statute would regulate conduct that is not in interstate commerce, and it is unreasonable to conclude that the Constitution hangs “so important an assignment of legislative power . . . on so inconspicuous a peg” as the Necessary and Proper Clause.¹⁰³ With this as our premise, “it would be even more unreasonable to suppose that the federal courts have a law-making power which the federal legislature does not.”¹⁰⁴ Instead “in the case of a government whose legislature has only such powers as are specifically granted,” like ours, it cannot be that federal courts can “make law without possibility of Congressional correction.”¹⁰⁵ Thus, when federal courts act in diversity cases, they cannot go beyond the power that Congress has. Concluding Judge Friendly’s argument, because *Swift*’s interpretation of the Rules of Decision Act allowed federal judges “to declare rules of decision

¹⁰¹ Green, *supra* note 11, at 612.

¹⁰² Friendly, *supra* note 36, at 394.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 395.

¹⁰⁵ *Id.* This point is especially important. The creation of diversity jurisdiction in Article III should not be construed as an independent source of power for federal courts to craft law wholly independent of any congressional authorization. It strains logic to say that the Constitution creates an elaborate lawmaking process that only gives “legislative powers” to Congress, while at the same time empowering the Judiciary to bypass that lawmaking process with wide-spread independent action. Indeed, as explained below, it is not without reason that only Congress is given such “legislative powers.” See *infra* text accompanying notes 135–47. Thus, as Judge Friendly wisely observed, consistent with the constitutional order, it simply cannot be that Article III itself authorizes a *Swift*-like regime. See Friendly, *supra* note 36, at 394–95. Moreover, as noted above, there is no indication in *Swift* that Justice Story believed that Article III granted federal courts such a power. See *supra* note 64. Finally, also as detailed below, Chief Justice Marshall expressly explained that the nondelegation doctrine applies to the Judiciary, see *infra* text accompanying notes 166–67, suggesting *a fortiori* that courts lack the power to make law absent *any* delegation at all.

which Congress was confessedly without power to enact as statutes,” that interpretation of the statute must fail.¹⁰⁶

Judge Friendly’s constitutional reasoning is elegant. But there is a fatal flaw: *Erie* was not a “gap” case. As even Friendly himself was forced to concede (albeit in a footnote):

Erie differed from the hypothetical [charity immunity] case in that Congress *could* permissibly have legislated as to its subject-matter; it is scarcely doubtful that Mr. Justice Brandeis would have sustained, or that the present Court would sustain, an act of Congress establishing uniform rules of tort liability by interstate railroads to persons coming on their property. On this view, the statement as to lack of Congressional power, although generally valid, *may have been inappropriate to the case at hand* But the Court was approaching the issue in terms more general than Mr. Tompkins’ case.¹⁰⁷

In other words, under Judge Friendly’s theory, the Supreme Court in *Erie* was answering a question that the “case or controversy” actually before the Court did not and could not present.¹⁰⁸ That is hardly “praise” for *Erie*.¹⁰⁹

Professor Green, like many others,¹¹⁰ seizes on this incongruity in Judge Friendly’s reasoning to claim that “[t]he problem with *Erie*’s enumerated-powers argument is that any ‘gap’ between Article III diversity jurisdiction and Article I legislative power is too small to explain *Erie*, much less justify the wholesale reversal of *Swift*-era common law.”¹¹¹ And, in any event, for good or for ill, precedent holds that “Congress’s commerce power is also greater now than in 1938.”¹¹² In sum, if *Erie* is an enumerated powers case, it is wrongly decided *both* on its own terms and in relation to subsequent Commerce Clause law.

The Tenth Amendment fares no better. If the Tenth Amendment is just the “mirror” of Congress’s enumerated powers, then it falls in tandem with the Commerce Clause.¹¹³ And even if the Tenth Amendment provides an independent basis to vindicate state sovereignty, *Erie* does not fit as a Tenth Amendment case. “After all, *Swift*’s federal general common law did not ‘commandeer’ state officials, nor did it even preempt state law as applied in

¹⁰⁶ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72 (1938).

¹⁰⁷ Friendly, *supra* note 36, at 397 n.66 (second emphasis added).

¹⁰⁸ See U.S. CONST. art. III, § 2, cl. 1.

¹⁰⁹ Friendly, *supra* note 36, at 383.

¹¹⁰ E.g., Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1657–59 (2008).

¹¹¹ Green, *supra* note 11, at 612.

¹¹² *Id.* at 613 (citing, *inter alia*, *Gonzales v. Raich*, 545 U.S. 1, 22–23 (2005)).

¹¹³ See, e.g., *New York v. United States*, 505 U.S. 144, 156–57, 187–88 (1992).

state court.”¹¹⁴ Likewise, *Swift* did not infringe on “functions essential to [states’] separate and independent existence,”¹¹⁵ nor is it obvious that *Swift* intruded on any “traditional aspect[] of state sovereignty.”¹¹⁶ The Tenth Amendment cannot explain *Erie* either.¹¹⁷

There is, of course, an obvious counter-argument to all of this: “So what?” Why does it matter that *Erie*’s particular facts are not consistent with an enumerated powers argument, so long as the law is right as a general matter? The Supreme Court is frequently sloppy—it reaches out to decide questions that are not squarely presented and overrules cases all the time—and it often makes broad constitutional rulings when more narrow ones would do. It does not follow that the constitutional rulings we get from those sloppy cases do not somehow “count.” In other words, if *Erie* reached the correct constitutional result (i.e., *Swift* unconstitutionally allowed federal courts to make law beyond Congress’s enumerated powers), then why does it matter going forward—that is, to anyone but the parties in *Erie*—whether the Court picked a poor factual vehicle to state a correct principle of constitutional law?

It matters for three related reasons. First, if the *Erie* Court overreached and made a rule that applies to cases that fall both within *and* without Congress’s enumerated powers when the constitutional reasoning only supports the latter, then why does not *Swift* still apply for cases that are within Congress’s enumerated powers? Second, if *Erie* rests on enumerated power grounds, and it is *stare decisis* that is holding *Swift* back today even for cases within Congress’s enumerated powers, then *Erie* is a narrow ruling indeed. All Congress would have to do is re-enact *Swift* with a Commerce Clause hook, and then we would have *Swift* 2.0, which would be almost identical to the original scheme. There is, however, no suggestion in *Erie* to conclude that the Court intended such a narrow decision. Finally, and most importantly, if *Erie* rests on enumerated powers grounds, then it does not explain the Court’s subsequent extension of *Erie* into new areas of law that *do* fall squarely within Congress’s power, such as customary international law. This is Professor Green’s point.¹¹⁸ Enumerated powers cannot explain *Erie* as it now operates in constitutional law, as reflected in cases like *Sosa*.

¹¹⁴ Green, *supra* note 11, at 609 (citing, *inter alia*, *Printz v. United States*, 521 U.S. 898 (1997)).

¹¹⁵ *Id.* at 610 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

¹¹⁶ *Id.* at 610 (alterations in original) (quoting *Nat’l League of Cities v. Usery*, 426 U.S. 833, 849 (1976)).

¹¹⁷ See Clark, *supra* note 64, at 1298–99 (explaining why the Tenth Amendment is inapt).

¹¹⁸ Green, *supra* note 11, at 614–15.

If the *Erie* doctrine is to be explained *as it now exists*, there must be a different ground than enumerated powers.

3. *The Supremacy Clause*

Because traditional accounts of *Erie* are unsatisfactory, Professor Branford Clark has advanced another constitutional reason why *Swift* had to go: the Supremacy Clause.¹¹⁹ This argument is based on the structural claim that to be valid federal “law,” law must be made with the “assent of the states or their representatives in the Senate.”¹²⁰ There is much to commend in this argument. As Professor Green notes, however, this ambitious (and intuitively appealing) argument cannot be reconciled with longstanding precedent if it means that federal courts cannot create common law at all.¹²¹

But Professor Clark’s position is more subtle than that. He suggests that federal courts can indeed create common law—if “[a]uthorized by Congress” to do so.¹²² But he claims that there was no such authorization in *Erie* because “the *Swift* doctrine eventually degenerated into an excuse for federal

¹¹⁹ See Clark, *supra* note 64, at 1289–90 (citing Paul J. Mishkin, *Some Further Last Words on Erie*, 87 HARV. L. REV. 1682, 1688 (1974)); *id.* at 1302 (“Thus, in the absence of an applicable rule of decision supplied by the ‘Constitution,’ ‘Laws,’ or ‘Treaties’ of the United States [the three parts of the Supremacy Clause], federal courts simply lack constitutional authority to disregard state law. In this sense, the precise constitutional source of the *Erie* decision is the Supremacy Clause.”).

¹²⁰ *Id.* at 1290.

¹²¹ See, e.g., Craig Green, *Erie and Problems of Constitutional Structure*, 96 CAL. L. REV. 661, 661–62 (2008) (“Despite the impressive quality and breadth of Clark’s work, this Essay disputes his view that the Supremacy Clause is a constitutional basis for *Erie*” because it would “invalidate most (or all) federal common law.”). Professor Green also notes that *Swift*’s general common law was not “supreme law” in that state courts did not need to follow it, and that “an equally valid inference might suggest that supreme preemptive federal law must satisfy different constitutional standards than non-supreme federal law like *Swift*.” See *id.* at 665–66. Professor Clark ably parries, however, by noting that “[t]he Constitution does not recognize a category of non-supreme federal law that federal courts are free to make on their own initiative.” Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CAL. L. REV. 699, 708 (2008).

¹²² Clark, *supra* note 64, at 1301–02 (emphasis added) (“Apart from any constitutional limits on the scope of federal power in general, “[p]rinciples related to the separation of powers impose an additional limit on the authority of federal courts to engage in lawmaking on their own (*unauthorized by Congress*).” (alteration in original) (emphasis added) (quoting Mishkin, *supra* note 119, at 1683)); see also *id.* at 1310–11 (citing, *inter alia*, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)) (recognizing that if there has been a constitutionally valid delegation, then a judge-made rule does not run afoul of his conception of the Supremacy Clause).

courts to make their *own* body of law in diversity cases.”¹²³ He argues that *Swift* was unconstitutional under the Supremacy Clause because federal judges were making law that Congress never empowered them to make.

Professor Clark’s argument is important, but there is a loophole: It only works if *Swift*, as interpreted and applied by courts at the time of *Erie*, was wrong as a matter of statutory interpretation—in other words, that Congress did *not* authorize it. On the other hand, if *Swift* and the cases that followed it were right that Congress *had* implicitly delegated such broad authority to the federal bench, i.e., that the Rules of Decision Act actually authorized the creation of general common law, then Clark’s Supremacy Clause concerns presumably are met.¹²⁴

Indeed, even if *Swift* and later cases were wrong on that question of statutory interpretation, there is a good argument that stare decisis still ought to have applied. After all, surely a court is not violating the Supremacy Clause every time it innocently misinterprets a statute, even though the resulting interpretation does not reflect the “assent of the states or their representatives in the Senate.”¹²⁵ (Were it otherwise, *every* statutory case would be a constitutional case for purposes of stare decisis.) And if the federal courts were “authorized” to create federal common law—either because *Swift* was right as a matter of interpretation or because of stare decisis—then Professor Clark’s Supremacy Clause argument is beside the point.

4. Another Constitutional Basis Is Required for *Erie*

In sum, previous justifications for *Erie* are wanting. Unless another constitutional basis can be offered, Professor Green has, *at least*, a solid footing to argue that *Erie* should not be “expan[d]ed beyond its proper scope: federal courts deciding legal issues commonly heard in state court,” and that we should “jettison[] such constitutional arguments altogether.”¹²⁶ But there is another basis for *Erie*: the nondelegation doctrine.

¹²³ *Id.* at 1309 (emphasis added).

¹²⁴ To be sure, Professor Clark at times seems to make broader arguments that suggest that even if Congress did authorize such judicial lawmaking, it would be unconstitutional under the Supremacy Clause. *E.g.*, Clark, *supra* note 121, at 715–19. He does not, however, ground his *Erie* argument in nondelegation cases like *Panama Refining* and *Schechter Poultry*. Nonetheless, his argument and this Article work in tandem: If Congress did not authorize the *Swift* regime, then it was unconstitutional under the Supremacy Clause; if Congress did authorize the *Swift* regime, then it was unconstitutional under the nondelegation doctrine.

¹²⁵ Clark, *supra* note 64, at 1290.

¹²⁶ Green, *supra* note 11, at 614–15.

The nondelegation doctrine, moreover, does something different than either of the two plausible competing visions of *Erie* just set forth—enumerated powers (per Judge Friendly) or the Supremacy Clause (per Professor Clark). On both of those readings of *Erie*, Congress could amend the Rules of Decision Act to reinvigorate *Swift*—for instance by either adding a Commerce Clause hook or by expressly authorizing the creation of federal common law. Both views are wrong—*Erie*'s holding is not so narrow. Instead, consistent with the claims made by the *Erie* Court itself, Congress could not bring back *Swift* even if Congress wanted to do so.¹²⁷ The nondelegation doctrine stands in the way.

III. *ERIE* AS NONDELEGATION

Because *Erie* cannot be justified by previous explanations, to be valid *Erie* must be explained in some other way. This "other way" must be the separation of powers.¹²⁸ But what *type* of separation of powers argument fits *Erie*? This question matters because separation of powers comes in different flavors. An especially sharp view of the separation of powers might suggest that *all* federal common law is unconstitutional.¹²⁹ Or a diluted version of that sharp argument might be that all federal law is presumptively unconstitutional, subject to reluctant acquiescence for special circumstances.¹³⁰

While those *are* separation of powers arguments, and though they are not without appeal as a theoretical matter, they cut too broadly in light of the actual precedent that is on the books. It does not fit with our country's unbroken line of practice to say that federal courts cannot make common law or that it is presumptively unconstitutional for them to do so. Federal courts do make common law, they always have made common law, and most times when they make federal common law it is not constitutionally problematic. Indeed, federal courts have been specifically empowered to make federal

¹²⁷ *E.g.*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 88 (1938) (Butler, J., dissenting) ("Indeed, it would have been appropriate to give Congress opportunity to be heard before *devesting it of power to prescribe rules of decision to be followed in the courts of the United States.*" (emphasis added)).

¹²⁸ *See, e.g.*, Green, *supra* note 11, at 637 (noting that many have concluded that *Erie* must be grounded in the separation of powers or not at all); Young, *supra* note 110, at 1657–59 (explaining why a separation of powers argument is necessary).

¹²⁹ *See supra* note 16 and accompanying text.

¹³⁰ *See, e.g.*, Green, *supra* note 11, at 637 (noting that some believe there should be no federal common law, "with only a few grudging exceptions").

common law since the very beginning of the Republic.¹³¹ But just because some separation of powers arguments are too ambitious, it does not follow that they all are. The nondelegation doctrine provides an excellent account for the holding in *Erie* and the Court's extension of *Erie* beyond the diversity context.

A. The Nondelegation Doctrine

The Supreme Court has explained that “[t]he nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.”¹³² Because “[t]he Constitution provides that ‘[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,’” the Court has “insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.”¹³³ In other words, precedent holds that “[w]hile Congress is free to seek help from the other branches, there is a core of legislative power that Congress cannot give away without violating the constitutional separation of powers.”¹³⁴ Thus, while “[t]he line between proper delegations and prohibited transfers of ‘legislative’ power is not a bright one, . . . [n]evertheless, the basic notion that the Constitution imposes some restrictions on Congress’s ability to delegate lawmaking authority away is deeply entrenched in constitutional law and widely accepted in constitutional commentary.”¹³⁵

Start with first principles. The Constitution carefully confers powers on all three branches of government.¹³⁶ Importantly, each branch’s power is distinct in text, history, and purpose.¹³⁷ It is fanciful to think that this allocation of powers is unimportant in the constitutional scheme. The nondelegation doctrine therefore is based on the commonsensical premise that the Constitution’s formal structure must be respected.

¹³¹ See, e.g., Lemos, *supra* note 28, at 411 (“From the early days of the Republic, Congress voluntarily has ceded—‘delegated,’ in common parlance—substantial lawmaking powers to members of both the executive and judicial branches.”).

¹³² *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

¹³³ *Id.* at 371–72 (second alteration in original) (quoting U.S. CONST. art. I, § 1).

¹³⁴ See Lemos, *supra* note 28, at 407.

¹³⁵ *Id.* at 413.

¹³⁶ Compare U.S. CONST. art. I (Congress), with *id.* art. II (the Presidency), with *id.* art. III (the Judiciary).

¹³⁷ Compare THE FEDERALIST NOS. 52–58, 62–63 (James Madison), NOS. 59–61, 65–66 (Alexander Hamilton), NO. 64 (John Jay) (explaining the powers of the legislative branch), with *id.* NOS. 67–77 (Alexander Hamilton) (explaining the powers of the executive branch), with *id.* NOS. 78–83 (Alexander Hamilton) (explaining the powers of the judicial branch).

But the nondelegation doctrine is more than just formalism—though “[l]ong live formalism”!¹³⁸ It is also functional. Congress is the only branch that is entrusted with “legislative powers.” This is by design. The reason *why* Congress is entrusted with legislative powers is that it is uniquely able to use them well,¹³⁹ and, equally important, because it is uniquely confined in its ability to abuse them.¹⁴⁰ To ensure that this functional reality is respected, Congress must be the branch that exercises whatever legislative power is granted to the federal government.¹⁴¹

Accordingly, while “the nondelegation principle seems to raise the burdens and costs associated with the enactment of federal law,”¹⁴² and so “may create a ‘status quo bias’ . . . ,”¹⁴³ these ‘burdens and costs’ can also be seen as ‘an important guarantor of individual liberty, because they ensure that national governmental power may not be brought to bear against

¹³⁸ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 25 (Amy Gutmann ed., 1997).

¹³⁹ A cursory review of Article I demonstrates that Congress is specifically designed to exercise legislative powers. Congress, for instance, is built to encourage unrestrained debate: “The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.” *Gravel v. United States*, 408 U.S. 606, 616 (1972) (discussing U.S. CONST. art. I, § 6, cl. 1). Likewise, Congress has Members from throughout the nation, ensuring that many points of view are represented. *See* U.S. CONST. art. I, §§ 2–3.

¹⁴⁰ *See, e.g.*, John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG (2d) 191, 202 (2007) (“Madison and Hamilton, at least, explicitly recognized and reported what (I think) the structure makes obvious: bicameralism and presentment make lawmaking difficult by *design*. Their remarks on this point began as concessions. Madison thus acknowledged that ‘this complicated check on legislation may in some instances be injurious as well as beneficial.’ Hamilton likewise allowed that ‘the power of preventing bad laws includes that of preventing good ones.’ *But both quickly claimed those troubling features as virtues*. Madison emphasized that ‘the facility and excess of law-making,’ and not the converse, ‘seem to be the diseases to which our governments are most liable.’ And for Hamilton, ‘[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.’ The trade-off evident in the structure of Article I, Section 7 was not merely acknowledged, but endorsed by the document’s strongest defenders.” (alteration in original) (second and third emphases added) (footnotes omitted)).

¹⁴¹ Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1422 (2008) (“The nondelegation doctrine is rooted in Article 1, Section 1, and in the Court’s view, its purpose is therefore to require that laws are made by the national legislature.”).

¹⁴² Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 55 (2010) (quoting Sunstein, *supra* note 5, at 320).

¹⁴³ *Id.* (quoting Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 246 (2006)).

individuals without a consensus, established by legislative agreement on relatively specific words.”¹⁴⁴ Or, “[a]s [Professor John] Manning puts it,”

“Even the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking.” Indeed, “the cumbersomeness of the [constitutional] process seems obviously suited to interests that contradict the ‘more is better’ attitude that has come to be almost an unconscious assumption of public law.” Because delegation enables “lawmaking on the cheap,” adherence to the nondelegation doctrine safeguards important “interests by forcing specific policies through the process of bicameralism and presentment.” Moreover, “the nondelegation doctrine also promotes rule of law values” similar to those protected by “the void for vagueness doctrine” in the criminal context. For instance, “By ensuring that those asked to implement the law be bound by intelligible principles, the nondelegation doctrine” serves the purpose of “provid[ing] fair notice to affected citizens and also to discipline the enforcement discretion of unelected administrators and bureaucrats.”¹⁴⁵

Likewise (and reminiscent of Professor Clark’s Supremacy Clause argument set forth above), ¹⁴⁶ the nondelegation doctrine can be conceptualized as a protector of federalism. If federal power has not been exercised, then state law has not been preempted.¹⁴⁷ The upshot is that the easier it is to make federal law, the more state law will be set aside. The constitutional structure exists, in part, to ensure that before state law is preempted, the matter has been thoroughly examined in the Nation’s legislature.¹⁴⁸ If Congress can delegate its power to other branches of the federal government, then more policy will be governed by federal law than would otherwise occur. Indeed, “[t]he greatest threats to state autonomy arise, not surprisingly, out of . . . lawmaking by executive agencies and courts, neither of which are accountable to the states and each of which may produce law considerably more easily than Congress.”¹⁴⁹ The nondelegation

¹⁴⁴ *Id.* (quoting Sunstein, *supra* note 5, at 320).

¹⁴⁵ *Id.* (second and third alteration in original) (footnotes omitted) (quoting Manning, *supra* note 140, at 198–99; Manning, *supra* note 26, at 240; Sunstein, *supra* note 5, at 320).

¹⁴⁶ See *supra* Part II.C.3.

¹⁴⁷ *E.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 241 (1947) (Frankfurter, J., dissenting) (“Suffice it to say that due regard for our federalism, in its practical operation, favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State’s claim is in unmistakable conflict with what Congress has ordered.”).

¹⁴⁸ See, *e.g.*, Clark, *supra* note 64, at 1289–90.

¹⁴⁹ Young, *supra* note 110, at 1659.

doctrine, as with other separation of powers doctrines,¹⁵⁰ thus rightly plays an important role in constitutional law.

1. *The Nondelegation Doctrine Logically Applies to Both the Executive and Judicial Branches*

The nondelegation doctrine as applied to the Executive Branch has received far more than its fair share of ink—including this author's.¹⁵¹ Surprisingly, however, little attention has been directed towards the nondelegation doctrine's "blind spot"¹⁵²: delegations to courts. This is a mistake because the nondelegation doctrine has application for *both* the Executive and Judicial Branches. As Professor Margaret Lemos has thoughtfully written, "Just as agencies exercise a lawmaking function when they fill in the gaps left by broad [statutory] delegations of power, so too do courts."¹⁵³ Thus, though the nondelegation doctrine "typically [is] considered only with respect to agencies, the constitutional principles underlying the doctrine apply with full force to delegations to courts."¹⁵⁴ Professor Lemos also observes that there is no historical support for the notion that "the phrase 'the judicial power' in Article III necessarily connotes a lawmaking function,"¹⁵⁵ and that even if lawmaking is inherent in the judicial act, it is a "mistake[]" to replace "a question of degree for a question of kind."¹⁵⁶

In light of the discussion of the constitutional structure set out above, it is apparent that comparable constitutional concerns arise when "legislative" power is delegated to *either* the Executive or Judicial Branch. After all, in either scenario, a branch of the federal government other than the Legislature is making federal law. Thus, "to the extent that lawmaking by agencies triggers constitutional anxieties about the proper allocation of power among the three branches, so too should delegated lawmaking by courts."¹⁵⁷

¹⁵⁰ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151–61 (2010); *INS v. Chadha*, 462 U.S. 919, 951 (1983).

¹⁵¹ See, e.g., Loshin & Nielson, *supra* note 142; Aaron Nielson, *An Indirect Argument for Limiting Presidential Power*, 30 HARV. J.L. & PUB. POL'Y 727, 739, 745 (2007).

¹⁵² See Lemos, *supra* note 28, at 407.

¹⁵³ *Id.* at 408.

¹⁵⁴ *Id.* at 405.

¹⁵⁵ *Id.* at 440.

¹⁵⁶ *Id.* at 441–42. Professor Lemos's analysis is theoretically compelling. But it lacks a defining precedent—i.e., an actual case in which the nondelegation doctrine was applied to the Judiciary in a significant way. As discussed below, this Article builds upon Professor Lemos's excellent work by providing that signature case: *Erie*.

¹⁵⁷ See *id.* at 408 (footnote omitted).

This conclusion is bolstered by then-Justice Rehnquist's well-known concurrence in the *Benzene Case*.¹⁵⁸ There, Rehnquist explained the benefits of the nondelegation doctrine in a way that is equally applicable when Congress delegates power to courts as when Congress delegates power to agencies. He wrote:

[T]he nondelegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.¹⁵⁹

Tellingly, nothing in Justice Rehnquist's statement is limited to delegations to the Executive Branch—and for good reason. Courts are many things, but they are not more "responsive to the popular will" than is Congress. Instead, by constitutional design, courts are *less* politically accountable than both Congress *and* administrative agencies.¹⁶⁰ There also is no reason why the "intelligible principle" requirement should change when a court and not an agency is the delegate; as Justice Rehnquist made clear, the purpose of the "intelligible principle" is to make sure that Congress sets policy with a standard that can be ascertained.¹⁶¹ Thus, the nondelegation doctrine should not be applied with less vigor in the judicial context than in the agency context.

¹⁵⁸ *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case)*, 448 U.S. 607, 685–86 (1980).

¹⁵⁹ *Id.* (Rehnquist, J., concurring) (citations omitted). It should be noted that there is a vigorous debate about whether the nondelegation doctrine has a constitutional basis in the first place. Compare, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (arguing there is no constitutional basis), with Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (defending the doctrine). This Article, of course, sides with the doctrine's defenders.

¹⁶⁰ See, e.g., Lemos, *supra* note 28, at 449–50; Loshin & Nielson, *supra* note 142, at 25 (explaining that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is largely based on the fact that courts have less "political accountability" than agencies).

¹⁶¹ *Benzene Case*, 448 U.S. at 685–86.

On the other hand, there are compelling reasons why, “[i]f anything,” the nondelegation doctrine should be applied with “special concern” in the context of delegations to the Judiciary.¹⁶² Generalist judges are “not experts” and they “encounter issues one case at a time, which may make it hard for them to see the big picture.”¹⁶³ As just explained, courts are *less* politically accountable than either the Executive or Legislative Branches. Federal judges have life tenure and salary protection for a reason, but that reason is not political accountability.¹⁶⁴ “Thus, even if there are good reasons for the Court’s hands-off approach to agency-administered statutes, the usual lines of defense cannot be used to justify broad delegations to courts.”¹⁶⁵

2. History Confirms that the Nondelegation Doctrine Applies to Courts

Even though it makes conceptual sense to apply the nondelegation doctrine to courts, one obvious question is whether there is any historical justification for doing so. Law, like life, is often inconsistent, so just because Euclid might treat delegations to the Judicial Branch the same as delegations to the Executive Branch, it does not follow that the Constitution compels that logical consistency. Indeed, one must be wary before letting “logic” take

¹⁶² Lemos, *supra* note 28, at 409.

¹⁶³ *Id.* at 445–46.

¹⁶⁴ See, e.g., *United States v. Hatter*, 532 U.S. 557, 568–69 (2001) (explaining why federal courts are politically independent, and quoting Chief Justice Marshall’s observation that “[a] judge may have to decide ‘between the Government and the man whom that Government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular.’ A judge’s decision may affect an individual’s ‘property, his reputation, his life, his all.’ In the ‘exercise of these duties,’ the judge must ‘observe the utmost fairness.’ The judge must be ‘perfectly and completely independent, with nothing to influence or contro[l] him but God and his conscience.’ The ‘greatest scourge . . . ever inflicted,’ Marshall thought, ‘was an ignorant, a corrupt, or a dependent Judiciary.’” (second and third alterations in original) (citations omitted) (quoting PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830, at 616, 619 (1830))).

¹⁶⁵ Lemos, *supra* note 28, at 409. “Indeed, delegations to courts may be particularly problematic given the considerable differences between courts and agencies in terms of institutional design and capacity.” *Id.* at 408–09. Professor Young makes a similar point:

These structural safeguards [such as oversight hearings and the like] are integral to the constitutional compromise that has at least papered over the inconsistency of broad agency delegations with Article I’s vesting of the legislative power in Congress. None of these safeguards can be invoked to support the exercise of delegated lawmaking authority by *courts*.

Young, *supra* note 110, at 1667 (footnote omitted).

precedence over experience when assessing the separation of powers.¹⁶⁶ “[A] page of history,” Justice Holmes reminds us, “is worth a volume of logic.”¹⁶⁷ In this case, however, history actually confirms that the nondelegation doctrine applies to the Judiciary too.

First, consider John Locke, the most famous father of the nondelegation principle. In an oft-quoted passage from his *Second Treatise of Government*, Locke wrote:

The power of the *legislative*, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.

. . . .

. . . The *legislative* neither must *nor can transfer the power of making laws* to any body [sic] else, or place it any where [sic], but where the people have.¹⁶⁸

There is no indication that those “other hands” can only be in the Executive Branch—indeed, “the executive power originally consisted of the present-day categories of executive power and judicial power,” and “Locke . . . sometimes used executive power to cover both the familiar executive power and the judicial power.”¹⁶⁹

¹⁶⁶ See, e.g., Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1121 (1994) (“Before we embark on any mission to tinker with the constitutional separation of powers, we would do well to heed Edmund Burke’s admonition to proceed with ‘infinite caution’”). See generally EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 220 (J. C. D. Clark ed., Stanford Univ. Press 2001) (1790) (“The science of government being therefore so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or of building it up again, without having models and patterns of approved utility before his eyes.”).

¹⁶⁷ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

¹⁶⁸ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 75 (C. B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

¹⁶⁹ Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 742 n.195 (2003).

Second, consider also the words of Chief Justice Marshall, the first Justice to invoke the nondelegation principle. "The Great Chief Justice"¹⁷⁰ expressly recognized in *Wayman v. Southard* that the nondelegation doctrine applies to the Judiciary. Writing for the Court, he unambiguously stated that "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."¹⁷¹ This is compelling authority from the Republic's early days, and from one of the Court's most thunderous voices, that the nondelegation doctrine applies with at least equal force in the judicial context.

Because the case is so important to understanding the nondelegation doctrine, it is worth pausing for a moment to examine *Wayman*. There, "the Court considered a challenge" to the federal Judiciary's power to make its own procedural rules.¹⁷² Specifically,

[t]he Process Act required federal courts in common law actions to apply the procedural rules that existed as of 1789 in the states in which they sat, "subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court shall think proper from time to time by rule to prescribe to any circuit or district court"¹⁷³

The question was whether that delegation was constitutional.¹⁷⁴ The Supreme Court upheld the statute because Congress "delegated *only* 'a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution.' The delegation, in other words, was limited to matters 'of less interest.' The 'important subjects' had been resolved by Congress itself."¹⁷⁵ In other words, the delegation was constitutional only because it was not "strictly and exclusively legislative."¹⁷⁶

¹⁷⁰ E.g., CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996).

¹⁷¹ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825) (emphasis added).

¹⁷² See Lemos, *supra* note 28, at 413.

¹⁷³ *Id.* (alteration in original) (quoting Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (1792)).

¹⁷⁴ See *Wayman*, 23 U.S. (10 Wheat.) at 42 ("The counsel for the defendants contend, that this clause, if extended beyond the mere regulation of practice in the Court, would be a delegation of legislative authority which Congress can never be supposed to intend, and has not the power to make.").

¹⁷⁵ Lemos, *supra* note 28, at 414 (emphasis added) (quoting *Wayman*, 23 U.S. (10 Wheat.) at 45).

¹⁷⁶ *Wayman*, 23 U.S. (10 Wheat.) at 42-43.

3. *Why Courts Are Reluctant to Enforce the Nondelegation Doctrine*

Despite the important constitutional values served by the nondelegation doctrine, the Supreme Court has only expressly struck down two statutes as unconstitutional on nondelegation grounds—"both in 1935, one of which 'provided literally no guidance for the exercise of discretion [(*Panama Refining*)], and the other of which [(*Schechter Poultry*)] conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'"¹⁷⁷ But those two cases are telling because they reveal what role the nondelegation doctrine plays in constitutional adjudication. Under Supreme Court precedent—precedent, of course, which has never been overruled—a delegation can be unconstitutional if (1) there is no intelligible principle at all (a *Panama Refining* problem)¹⁷⁸ or (2) the delegation has an extraordinarily enormous economic effect and an ill-defined intelligible principle (a *Schechter Poultry* problem).¹⁷⁹

Importantly, there is a sliding scale: the more important the decision, the more congressional guidance is required.¹⁸⁰ This suggests that lesser policy choices can be delegated more liberally than important choices—though such a test risks circularity. As Professor Gary Lawson has joked, "the core of the Constitution's nondelegation principle can be expressed as follows: Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them."¹⁸¹ But

¹⁷⁷ Loshin & Nielson, *supra* note 142, at 55 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (citing *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935))).

¹⁷⁸ See *Pan. Ref.*, 293 U.S. at 429–30; *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle . . . , such legislative action is not a forbidden delegation of legislative power.").

¹⁷⁹ *Schechter Poultry*, 295 U.S. at 548–50.

¹⁸⁰ See *Am. Trucking*, 531 U.S. at 475 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). Indeed, Justice Thomas is explicit that a delegation can be unconstitutional even if there is an intelligible principle: "I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. [Instead,] there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Id.* at 487 (Thomas, J., concurring); see also *Clinton v. City of New York*, 524 U.S. 417, 486 (1998) (Breyer, J., dissenting) ("[*Schechter Poultry*] involved a delegation through the National Industrial Recovery Act that contained not simply a broad standard ('fair competition'), but also the conferral of power on private parties to promulgate rules applying that standard to virtually all of American industry." (citation omitted)).

¹⁸¹ Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994).

“[a]lthough this circular formulation may seem farcical, it recognizes that a statute’s required degree of specificity depends on context”¹⁸²

At the same time, the Supreme Court has not enforced the nondelegation doctrine in many seemingly appropriate situations. As explained in 2001’s *American Trucking* decision, the Court has upheld

a statute giving an “agency power to fix the prices of commodities at a level that ‘will be generally fair and equitable and will effectuate the . . . purposes of th[e] Act,’” statutes “authorizing regulation in the ‘public interest,’” and a statute granting the “Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not ‘unduly or unnecessarily complicate[d]’ and do not ‘unfairly or inequitably distribute voting power among security holders.’”¹⁸³

Though these may seem like “easy kills” under the nondelegation doctrine, the Supreme Court still stayed its hand.¹⁸⁴

There is reason for this judicial timidity—even though sometimes it may be laid on a bit thick.¹⁸⁵ Courts do not enforce the nondelegation doctrine with more zeal because no administrable test has been devised to separate the lawful from the unlawful. As Justice Scalia, writing for a unanimous Court, has explained, “[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.”¹⁸⁶ (Note that Justice Scalia included the Judiciary in that statement.) Hence, the Supreme Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”¹⁸⁷ Instead, “[t]he constitutional question—the distinction between permissible ‘assistance’ and impermissible ‘legislation’—is one of

¹⁸² *Id.* (footnote omitted).

¹⁸³ See Loshin & Nielson, *supra* note 142, at 55–56 (alterations in original) (quoting *Am. Trucking*, 531 U.S. at 474).

¹⁸⁴ Lawson, *supra* note 181, at 1240.

¹⁸⁵ See, e.g., *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 34 (D.C. Cir. 2008) (Brown, J., dissenting in part) (“Like other courts that have rejected nondelegation challenges to [this statute], the majority nominally performs a nondelegation analysis but actually strips the doctrine of any meaning. It conjures standards and limits from thin air to construct a supposed intelligible principle for the . . . delegation. Although I agree the nondelegation principle is extremely accommodating, the majority’s willingness to imagine bounds on delegated authority goes so far as to render the principle nugatory.” (citations omitted)).

¹⁸⁶ *Am. Trucking*, 531 U.S. at 475 (alteration in original) (quoting *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

¹⁸⁷ *Id.* at 474–75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

degree.”¹⁸⁸ And courts are naturally loathe to get involved when the question is merely “one of degree” and not kind.

In fact, Chief Justice Marshall himself explained why enforcing the nondelegation doctrine is so difficult. In *Wayman v. Southard*, after setting forth the rule that Congress cannot “delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative,”¹⁸⁹ Marshall went on to note in the very next sentence:

But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going farther for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the Judiciary Act, and the 7th section of the additional act, empower the Courts respectively to regulate their practice. It certainly will not be contended, that this might not be done by Congress. The Courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended, that these things might not be done by the legislature, without the intervention of the Courts; yet it is not alleged that the power may not be conferred on the judicial department.

*The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.*¹⁹⁰

Chief Justice Marshall put his finger on what has ever been—and ever will be—the great weakness of the nondelegation doctrine: the line between permissible delegation and constitutional abdication is often impossible to draw. Thus, outside of extraordinary circumstances, the Judiciary will not invalidate a statute on nondelegation grounds.

4. *Enforcing Nondelegation Values Through Statutory Construction*

Even though they are not easily policed, however, the Court “has not surrendered the principles that underlie the nondelegation doctrine. Instead, the doctrine ‘has been relocated rather than abandoned.’”¹⁹¹ To protect nondelegation values without directly enforcing the nondelegation doctrine, federal courts regularly

¹⁸⁸ Lemos, *supra* note 28, at 417–18.

¹⁸⁹ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

¹⁹⁰ *Id.* at 43 (emphasis added).

¹⁹¹ Loshin & Nielson, *supra* note 142, at 57 (quoting Sunstein, *supra* note 5, at 315–16).

interpret broadly phrased statutes more narrowly than their text suggests, thus avoiding nondelegation concerns. Indeed, the Court itself has stated, "In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that otherwise be thought to be unconstitutional."¹⁹²

The *Benzene Case* is a famous example of this practice, but there are others.¹⁹³

In the *Benzene Case*, Justice Stevens, writing for a plurality, confronted a statute which required the Secretary of Labor to "promulgat[e] standards dealing with toxic materials or harmful physical agents," and which said that the Secretary must "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard . . . for the period of his working life."¹⁹⁴ In a bit of creative interpretation, the Court's plurality found that, notwithstanding this expansive language, the Secretary nonetheless must "find, as a threshold matter, that the [toxin] poses a significant health risk in the workplace and that a new, lower standard is therefore 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'"¹⁹⁵

Importantly, the plurality reasoned that without "a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry,"¹⁹⁶ and explained that "the statute would make such a sweeping delegation of legislative power that it might be unconstitutional under" principles of nondelegation if it were read as broadly as the text suggested.¹⁹⁷ In his concurrence, Justice Rehnquist contended that directly enforcing the nondelegation doctrine is better than

¹⁹² *Id.* at 57–58 (quoting *Mistretta*, 488 U.S. at 373 n.7).

¹⁹³ See, e.g., *id.* at 60–63 (discussing the "elephants in mouseholes" line of cases); see also *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case)*, 448 U.S. 607, 682 (1980) (Rehnquist, J., concurring) ("In prior cases this Court has looked to sources other than the legislative history to breathe life into otherwise vague delegations of legislative power." (citing *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946))).

¹⁹⁴ *Benzene Case*, 448 U.S. at 612 (plurality opinion) (quoting 29 U.S.C. § 655(b)(5) (1976)).

¹⁹⁵ *Id.* at 614–15 (plurality opinion) (quoting 29 U.S.C. § 652(8) (1976)).

¹⁹⁶ *Id.* at 645 (plurality opinion).

¹⁹⁷ *Id.* at 646 (plurality opinion) (internal quotation marks omitted).

indirectly narrowing a delegation's scope through statutory interpretation.¹⁹⁸ The rest of the Court, however, declined to follow his lead.

In light of cases like the *Benzene Case*, Professor Cass Sunstein has observed that "the nondelegation doctrine has not been interred," but instead is found in "a set of nondelegation canons, which forbid executive agencies from making certain decisions on their own."¹⁹⁹ If an open-ended delegation of authority can be read narrowly, then even if the interpretation is not the most natural one, a court will still take that option to effectuate nondelegation values without actually invalidating the statute.²⁰⁰ "In this way, the nondelegation cannons [can be] understood as a species of judicial minimalism, indeed democracy-forcing minimalism"²⁰¹ While these nondelegation canons can lead to doctrinal incoherence because courts are unable to apply them in a consistent manner,²⁰² it nonetheless is a common move in administrative law cases for courts to read broad delegations narrowly to avoid nondelegation concerns.

B. Reading *Erie* as a Nondelegation Case

The nondelegation doctrine explains *Erie* well.²⁰³ Consider the realities of *Swift*. Under *Swift*'s interpretation of the Rules of Decision Act, a huge swath of American law—much of it commercial law and so vital to the national economy—was governed by rules announced by unelected federal judges. These judge-made rules, moreover, were guided by no intelligible principle set by Congress. The text of the Rules of Decision Act does not

¹⁹⁸ See *id.* at 672 (Rehnquist, J., concurring) ("I would also suggest that the widely varying positions advanced in the briefs of the parties and in the opinions of MR. JUSTICE STEVENS, THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE MARSHALL demonstrate, perhaps better than any other fact, that Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court.").

¹⁹⁹ Loshin & Nielson, *supra* note 142, at 58–59 (quoting Sunstein, *supra* note 5, at 315).

²⁰⁰ See, e.g., *id.* at 30–35, 46, 52 (discussing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

²⁰¹ *Id.* at 59 (alterations in original) (quoting Sunstein, *supra* note 5, at 335).

²⁰² See *id.* at 65 ("Indeed, problems of judicial administration similar to those that plague the nondelegation doctrine also afflict its more evanescent proxy, as there is no consistent way to determine when the doctrine should apply.").

²⁰³ Though some commentators have briefly alluded to *Erie* in the nondelegation context, no one has systematically examined such a claim. See, e.g., Robert P. Wasson, Jr., *Resolving Separation of Powers and Federalism Problems Raised by Erie, the Rules of Decision Act, and the Rules Enabling Act: A Proposed Solution*, 32 CAP. U. L. REV. 519, 576–77 (2004).

speak to law creation (that power was inferred in *Swift*), and so says nothing about what principle should guide law creation. *Swift* thus represented unbridled judicial control over a great deal of the national economy.

That particular combination of expansive power over the national economy mixed with a statute lacking an intelligible principle is a recipe for aggressive enforcement of the nondelegation principle, as is demonstrated by *Schechter Poultry* and *Panama Refining*. Accordingly, because of the nondelegation doctrine, it simply is not true that “[w]here Congress speaks, *Erie* has nothing more to say.”²⁰⁴ When important policy issues are implicated, there are certain things that Congress cannot say to another branch of government, be it the Executive or the Judiciary—like, “You do it.”

1. Reading *Erie* as a Nondelegation Case Makes Sense at a “Micro” Level

The nondelegation doctrine fits the particular facts of *Erie* better than any other constitutional basis, so reading *Erie* as a nondelegation decision makes sense at a “micro” level.²⁰⁵ Pretend that the facts in *Erie* were just a little different: instead of federal courts creating rules of decision in diversity cases in which no state statute was on point, it was an executive agency creating those rules. And just to make the hypothetical cleaner, imagine further that Congress added a “Commerce Clause hook” allowing the executive agency to create such rules only insofar as it is within Congress’s Commerce Clause power. (Of course, in *Erie* there was no “Commerce Clause hook,” but as explained above, *Erie* itself was within Congress’s Commerce Clause power.)²⁰⁶ Congress can give the Executive Branch power to create substantive law in *some* instances. But if Congress were to attempt to give the Executive Branch authority to make rules for *all* federal diversity cases for which no state statute is on point, such an expansive delegation of power would present grave nondelegation concerns. Those concerns would be more serious still if Congress were to give the Executive Branch that much authority with no intelligible principle to guide any ensuing law creation. When such an extraordinary delegation is at issue, should it matter that the delegate is an Article III court and not an Article II agency?

²⁰⁴ Green, *supra* note 11, at 642.

²⁰⁵ To be clear, when using the term “micro,” this Article refers to whether a particular constitutional argument explains *Erie*’s conclusion vis-à-vis *Erie*’s specific facts and language. When using the term “macro,” this Article refers to whether a particular constitutional argument explains *Erie*’s role in the broader context of the law.

²⁰⁶ See *supra* Part II.C.2.

We know from Chief Justice Marshall's opinion in *Wayman v. Southard* that the nondelegation doctrine *can* apply to the Judiciary, for "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."²⁰⁷ We also know that the nondelegation doctrine will condemn delegations which "provide[] literally no guidance for the exercise of discretion" or "which confer[] authority to regulate the entire economy" without clear guidance.²⁰⁸ Further, with the exception of two justices, the *Erie* Court in 1938 was the same as the *Schechter Poultry* and *Panama Refining* Court of 1935.²⁰⁹ In other words, the *Erie* Court was composed of essentially the same members as the only Court in history that has actually struck down an act of Congress on nondelegation grounds—and, in fact, which did it twice. Overruling *Swift*'s interpretation of the Rules of Decision Act in *Erie* may have been aggressive, but was it any more aggressive than what the Supreme Court did in *Schechter Poultry*?

There are additional reasons why reading *Erie* as nondelegation makes sense at a "micro" level. While other potential constitutional grounds like equal protection, legal positivism, or federalism are misguided, nondelegation does not suffer from their flaws. Unlike the Equal Protection Clause, the nondelegation doctrine had already been held to apply to the federal government when *Erie* was decided. And unlike legal positivism, the nondelegation doctrine was a standalone reason to overrule *Swift*. Finally, unlike Judge Friendly's enumerated powers argument, the nondelegation doctrine could apply even if the subject matter of a statute is within Congress's enumerated powers—for instance, tort liability for accidents involving interstate trains. Thus, unlike these other possible constitutional justifications for *Erie*, the nondelegation doctrine explains the holding in *Erie* given the actual facts in *Erie* and the state of the law when *Erie* was decided.

Moreover, if *Erie* is understood as a nondelegation case like *Schechter Poultry* and *Panama Refining*, then the *Erie* Court's ruminations on the nature of common law also make a great deal of sense. After all, if common law is made, not found, then the implicit delegation recognized in *Swift* suddenly becomes much more open-ended, and so no longer "benign."²¹⁰ If common law adjudication is a mechanical process with only one answer

²⁰⁷ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

²⁰⁸ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (citing *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

²⁰⁹ Justices Willis Van Devanter and George Sutherland were replaced by Justices Hugo Black and Stanley F. Reed.

²¹⁰ Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1794 (1997).

which every court will end up reaching anyway, then the delegation of authority in the Rules of Decision Act (assuming that there was one) would not have been that expansive—avoiding the *Schechter Poultry* problem. There also, of course, would have been an intelligible principle—“find the platonic common law”—which would have solved the *Panama Refining* problem. But if it is impossible to “find” the “platonic common law” because there is no “platonic common law” to find, then suddenly it becomes apparent that federal courts under *Swift* were making their own law without any congressional guidance. Thus it is wrong to say that “*Erie*’s holding has *nothing* to do with jurisprudential conceptions of law.”²¹¹ Instead, “the Constitution and the Rules of Decision Act make the truth of [the nature of common law adjudication] relevant to the allocation of power in the federal system.”²¹²

To be sure, if *Erie* is understood as a nondelegation case, then legal positivism is not the *source* of the constitutional problem posed by *Swift*. That source would be the nondelegation doctrine. But a more complete understanding of what the common law actually entails vis-à-vis the power of judges would be pertinent to applying the nondelegation doctrine in the judicial context. Given legal positivism, the delegation inferred from the Rules of Decision Act in *Swift* was much more expansive than federal courts may have initially believed,²¹³ and so nondelegation doctrine concerns arose.

Ironically, Professor Green himself stumbles into this nondelegation argument. In his follow-up article responding to Professor Clark’s Supremacy Clause claim, Professor Green states:

Imagine, for example, that Congress enacted federal diversity jurisdiction with the explicit purpose that federal courts should encourage interstate commerce and avoid the misguided, biased rulings of state courts. In administrative parlance, the latter would certainly constitute an “intelligible principle” for non-delegation purposes. Now imagine that federal courts used this hypothetical jurisdiction to create supreme federal common law. (This would be *Swift v. Tyson* with preemptive teeth.) Under such circumstances, Clark would surely object on Supremacy Clause grounds,

²¹¹ Goldsmith & Walt, *supra* note 91, at 709 (emphasis added).

²¹² *Id.* at 711.

²¹³ See, e.g., *id.* at 711–12 (“There are doubtlessly readings of federal and state law that would make the truth of legal realism”—or positivism—“relevant to the allocation of lawmaking power in our federal system. Whether state and federal law now does so is a matter of contested interpretation. But even if state and federal law make legal realism [or positivism] relevant in this way, it is the law of a particular legal system that is doing the justificatory work, not the truth of legal realism”—or positivism. (emphasis added)).

and Congress's vague "intelligible principle" would be no help at all [for a Supremacy Clause argument].²¹⁴

With this brief discussion, offered in passing, Professor Green gives up the game. In the Rules of Decision Act, Congress did *not* include an "explicit purpose that federal courts should encourage interstate commerce and avoid the misguided, biased rulings of state courts" by creating federal common law to effectuate that purpose.²¹⁵ Hence, at a minimum, *Swift's* interpretation of the statute failed under *Panama Refining*. Moreover, it is extremely doubtful whether such a vague "intelligible principle," even if it actually were included in the statute, would be permissible under the nondelegation doctrine. As the Supreme Court has made clear, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."²¹⁶ This is the point of *Schechter Poultry*: There are some delegations that Congress simply cannot make, even if a "vague 'intelligible principle'"²¹⁷ is included.

2. Reading *Erie* as a Nondelegation Case Makes Sense at a "Macro" Level

Reading *Erie* as nondelegation also makes sense at a "macro" level. A perennial problem for federal courts scholars is understanding the nature of federal common law, and *Erie's* role in it. If *Erie* is understood as *forbidding* federal common law altogether as a matter of separation of powers, then *Erie* is irreconcilable with what federal courts have long done²¹⁸—and, indeed, what the *Erie* Court itself did.²¹⁹ Federal courts make a lot of federal common law, in a lot of different contexts.²²⁰ Reading *Erie* as a

²¹⁴ Green, *supra* note 121, at 677 (footnote omitted).

²¹⁵ *Id.*

²¹⁶ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001).

²¹⁷ Green, *supra* note 11, at 677.

²¹⁸ See, e.g., *id.* at 632 ("[T]he Framing generation thought that federal courts held extremely robust common-law powers." (citing Alton B. Parker, *The Common Law Jurisdiction of the United States Courts*, 17 YALE L.J. 1, 6 (1907))); see also *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 50 (1825) (upholding federal courts' common-law power to establish their own procedures, which power was delegated by Congress in the earliest days of the Republic).

²¹⁹ See, e.g., Green, *supra* note 11, at 620 ("On the same day *Erie* was decided, for example, the Court applied federal common law to an interstate border dispute, and Brandeis wrote both majority opinions." (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938))).

²²⁰ See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 476 (2008) (expressly creating rule for punitive damages in the admiralty context as a matter of federal common

nondelegation decision minimizes this doctrinal tension. Just as executive officers are not constantly looking over their shoulders due to fear of the nondelegation doctrine whenever they execute the law,²²¹ federal judges need not worry about nondelegation concerns *too* much—at least not most of the time.

But for both branches, the nondelegation doctrine has a role in extraordinary circumstances. At some point, a delegation can be simply too much. When that happens, it must be struck down under *Schechter Poultry* and *Panama Refining*, and, indeed, under *Erie*. In other words, reading *Erie* as a nondelegation decision preserves a substantial role for federal common law, but not a limitless role.

This is not to say that the nondelegation doctrine should operate identically in both contexts. In fact, there are good reasons to think that federal courts should be *more* aggressive in policing the nondelegation line when they are Congress's chosen delegate. First, the separation of powers problems are lessened; there is an intuitive difference between a federal court saying that Congress cannot give power to the President and a federal court saying Congress cannot give power to a federal court. A court's declining power for itself is surely different than a court declining power on behalf of someone else. And second, there are more institutional checks which minimize nondelegation concerns when the Executive is exercising delegated power: "[M]odern administrative law critically relies on ex post mechanisms—checks on the exercise of delegated authority that operate *after* the initial grant—to legitimate delegation of lawmaking authority outside of Congress."²²² Agencies, for instance, "are accountable to Congress through oversight hearings, budgetary dependence, and Senate confirmation of agency officials," and "judicial review [helps assure] conformity [with] the agency's statutory mandate."²²³ This is not true for federal courts. For these reasons, an "extraordinary circumstances" test might be an easier standard to meet in the judicial context.

Reading *Erie* as a nondelegation decision also avoids another "macro" problem. Professor Green argues that *Erie* should not be extended beyond the diversity context, and that the Supreme Court's invocation of *Erie* outside of that context is a doctrinal blunder.²²⁴ Not so. If *Erie* is a nondelegation case,

law); *United States v. Auster*, 517 F.3d 312, 320 (5th Cir. 2008) (expressly deciding the scope of the psychotherapist–patient privilege as a question of federal common law).

²²¹ See, e.g., *Am. Trucking*, 531 U.S. at 474–75 ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))).

²²² Young, *supra* note 110, at 1668.

²²³ *Id.* at 1667.

²²⁴ See, e.g., Green, *supra* note 11, at 614.

then it can and should apply in many contexts. The common denominator for striking down a delegation under the nondelegation doctrine is not what type of case is before the court (nor what branch of government is the delegate), but instead is how much authority Congress has given away. Understanding *Erie* as nondelegation thus avoids reading *Erie* so narrowly that the Court's reliance on it in nondiversity cases like *Sosa v. Alvarez-Machain*²²⁵ was error. It is not error to extend *Erie* because *Erie* is bigger than just diversity jurisdiction.²²⁶

The upshot of this is that most federal common law is not unconstitutional, but that *Erie* still has a role to play in nondiversity contexts. Thus, if Congress wants to authorize the *specific* result reached in *Swift*, Congress can do so by specifically giving federal courts authority to create efficient rules for *commercial paper disputes* brought in federal court under the diversity statute. That would be a narrow delegation with an intelligible principle. Or, indeed, Congress could *specifically* authorize the federal courts to craft rules of tort liability for interstate trains, either as a matter of diversity jurisdiction or federal question jurisdiction, provided that Congress includes *clear* directions as to what purpose the federal rules are to accomplish. That too would be a narrow delegation with an intelligible principle. But what Congress cannot do is delegate power to create law in nearly every diversity case with no intelligible principle at all. While this line-drawing is not easy and so should not be treated lightly, in an extraordinary situation (like in *Schechter Poultry*, *Panama Refining*, and *Erie*) a delegation can simply go too far.

Finally, the most important “macro” reason for reading *Erie* as a nondelegation case is that it gives teeth to the constitutional structure. For reasons explained above, the nondelegation doctrine is more than empty formalism (though formalism by itself is enough). It is also functional—and tremendously important. Congress alone should exercise legislative powers because Congress alone is built to do so. And just as significantly, Congress alone should exercise legislative powers because Congress is institutionally

²²⁵ 542 U.S. 692 (2004).

²²⁶ Indeed, Professor Green himself identifies this point, but fails to appreciate its significance. He expressly notes that *Swift* may have been unconstitutional because it “allow[ed] federal judges to make law with too much discretion and too little congressional guidance.” Green, *supra* note 11, at 618. He seemingly did not realize, however, that he was using language that reflects nondelegation principles. Instead, he jumped to the conclusion that if a separation of powers argument is accepted, then “most forms of federal common law [are] unconstitutional.” *Id.* Under the nondelegation doctrine, however (which *is* a separation of powers doctrine), it is not true that “most” federal common law is unconstitutional. As with the Executive Branch, it is only extraordinary delegations of power to the Judicial Branch that raise constitutional concerns.

designed to protect against the misuse of those legislative powers. Accordingly, federal lawmaking—at least at the broad level of animating policy—should occur in the halls of Congress. If Congress wants a code of commercial law to govern the United States, then Congress must make it, subject to the full gamut of procedures set out in Article I. It cannot hand off that undertaking to another branch of government, be it the Executive or the Judicial Branch. This basic principle is the core of the nondelegation doctrine, and *Erie* effectuates that core.

3. *Did the Supreme Court Intend to Issue a Nondelegation Decision in Erie?*

This discussion, however, prompts an important point. Even though it makes a great deal of doctrinal sense to understand *Erie* in nondelegation terms, one must ask whether the *Erie* Court actually *intended* it to be a nondelegation case. In other words, did the *Erie* Court deliberately (but opaquely) issue a nondelegation decision, or did the Court reach the right result but for the wrong reasons? Based on language used in *Erie*'s majority opinion and Justice Reed's concurrence, there is a plausible argument that *Erie* was intended to reflect nondelegation principles. But even if *Erie* was not written as a nondelegation decision, it should be understood as one going forward because the nondelegation doctrine offers the best account for *Erie*'s constitutional holding and for *Erie*'s application in cases outside of the diversity context.

The opinions in *Erie* contain a number of statements which suggest that nondelegation principles may have been on the Supreme Court's mind. The *Erie* majority held that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."²²⁷ This sentence deserves particular attention because it is the first sentence in the Court's constitutional reasoning.²²⁸ "Govern," of course, means "to *control* a point in issue."²²⁹ Thus, *Swift* was unconstitutional because federal law was being made that was not controlled by Congress. Such federal law was invalid, so state law applied. This analysis is consistent with the nondelegation doctrine. The purpose of the intelligible principle requirement is to ensure that it is Congress, the policymaking branch, which "governs" the creation of federal law.²³⁰ Without such an intelligible principle, a federal statute cannot stand.

²²⁷ *Erie R.R. Co. v. Thompson*, 304 U.S. 64, 78 (1938) (emphasis added).

²²⁸ *See id.*

²²⁹ BLACK'S LAW DICTIONARY 764 (9th ed. 2009) (emphasis added).

²³⁰ *E.g.*, *United States v. Bozarov*, 974 F.2d 1037, 1041 (9th Cir. 1992) ("Congress may therefore delegate under broad general directives so long as it 'clearly delineates

Likewise, as explained above, *Erie*'s constitutional analysis relies heavily on legal positivism. That also is a strong hint that nondelegation principles were at work. When the Supreme Court accepted that federal courts under the *Swift* regime were making and not merely finding law, then the delegation of authority under the Rules of Decision Act suddenly became much more expansive (or rather the expansiveness that had always been there was now in the open). The Court was concerned—palpably so. But the Court did not articulate well *why* it was concerned. The Court's underlying concern, however, can be explained quite naturally by the nondelegation doctrine: Federal courts cannot make such broad policy announcements without clear congressional guidance. Accordingly, the *Erie* Court held that "federal courts [lack] the power to use *their judgment* as to what the rules of common law are," and that "in the federal courts the parties are [not] entitled to an *independent judgment* on matters of general law."²³¹

Moreover, in his concurrence (which relied on statutory grounds alone), Justice Reed wrote:

The "unconstitutional" course referred to in the majority opinion is apparently the ruling in *Swift v. Tyson* that the supposed omission of Congress to legislate as to the effect of decisions leaves federal courts *free to interpret general law for themselves*. . . . If the [majority] opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion also seems questionable. The line between procedural and substantive law is hazy but no one doubts federal power over procedure. *Wayman v. Southard*, [23 U.S. (10 Wheat.) 1]. The Judiciary Article [III] and the "necessary and proper" clause of Article One may fully authorize legislation, such as this section of the Judiciary Act.²³²

Justice Reed's concurrence is not especially pellucid. But this paragraph can be understood to mean that he understood the majority opinion to say that because Congress did not direct the federal courts in the creation of general law, it was unconstitutional for them to do so. It is but a short throw from that conclusion to the nondelegation doctrine. Likewise, the invocation of the line between substance and procedure, read in conjunction with the cite to *Wayman v. Southard*, can be viewed as an attempt to limit *Erie*'s nondelegation holding to substantive, and not procedural, law. That is a line

[the] general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" (alteration in original) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946))).

²³¹ *Erie*, 304 U.S. at 79 (emphasis added) (internal quotation marks omitted) (finding the fallacy in *Swift* to be the assumption that federal courts *have* the power to create general common law).

²³² *Id.* at 91–92 (Reed, J., concurring) (emphasis added).

that Chief Justice Marshall arguably drew in *Wayman* when he held that Congress *can* delegate power over narrow procedural issues to the federal courts (as a “less[er]” matter), but expressly stated that delegations of substantive lawmaking power might be different.²³³ Justice Reed may have been trying to preserve that categorical distinction.

Importantly, however, even if the *Erie* Court did not set out to write a nondelegation opinion, it nonetheless is both permissible and sensible to understand *Erie* in nondelegation terms. Indeed, even if the Court based its decision on another constitutional ground altogether, it is appropriate to understand *Erie* as a nondelegation case, because “‘when the *ratio decidendi* of a previous case is obscure, out of accord with authority or established principle, or too broadly expressed,’” *stare decisis* only requires that the judgment be respected.²³⁴ The *Erie* Court’s constitutional reasoning was sparse and ill-defined—seemingly sounding more in intuition than rigorous analysis.²³⁵ It thus is appropriate to assess whether the Court’s decision has a constitutional basis, and then follow that basis. The nondelegation doctrine provides just such a constitutional basis.

4. Possible Objections to Reading *Erie* as a Nondelegation Decision

Professor Green raises a number of arguments why separation of powers analysis should not apply to *Erie*. For instance, he argues that a workable separation of powers argument “must differentiate common law from other forms of judicial activity, which is not easy.”²³⁶ True enough, though this argument surely proves too much.²³⁷

²³³ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

²³⁴ See BLACK’S LAW DICTIONARY 1537 (9th ed. 2009) (quoting RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 100–01 (4th ed. 1991)).

²³⁵ Needless to say, if the Supreme Court itself did not know the precise constitutional mooring of *Erie* when it decided the case on constitutional grounds, then that does not reflect well on the *Erie* Court. The Constitution must not be used for atmospherics.

²³⁶ Green, *supra* note 11, at 619; see also Green, *supra* note 121, at 678 (“The question of what counts as agency ‘lawmaking’ tracks the foregoing discussion of what constitutes ‘common law.’ Where does lawmaking start and stop?” (footnote omitted)).

²³⁷ See Clark, *supra* note 121, at 710 (“Courts and commentators self-consciously define federal common law in opposition to interpretation in order to distinguish between two conceptually distinct kinds of judicial activity. This distinction is necessary to uphold the widely-shared assumption that a Constitution that establishes a republican form of government and elaborate lawmaking procedures would not give unelected, life-tenured judges unchecked power to make federal law at will. To be sure, the line between interpretation and lawmaking is often difficult to draw Federal courts, however, have never considered themselves incapable of basing their own decisions on

And, in any event, this critique's edge is dulled if *Erie* is viewed as a nondelegation case. Under longstanding precedent, in most instances it will not be necessary to spend a great deal of time distinguishing between constitutional and unconstitutional delegation. Most delegations, after all, are constitutional. It is only in a case involving an extraordinary delegation—like *Schechter Poultry* and *Panama Refining*—where serious line-drawing is necessary. Moreover, line-drawing is arguably even less troublesome when courts and not agencies are Congress's chosen delegate, because "the sorts of broad and open-ended delegations that might trigger application of the nondelegation doctrine are relatively rare in the judicial context, far more rare than equivalent delegations to agencies."²³⁸

Professor Green's critique does present a deeper issue, however. Courts and commentators alike have not carefully explained what exactly they mean by "federal common law," particularly in application.²³⁹ When looking at "federal common law" through a nondelegation lens, we must be careful not to confuse the antecedent question of whether Congress has delegated authority in the first place with the question of whether a particular delegation is constitutional. After all, just because it may be constitutional for Congress to delegate to a court the power to create an evidentiary privilege (assuming, of course, that the delegation is not too expansive),²⁴⁰ it does not follow that Congress *has* delegated the power to create such a privilege under a particular statute. The same is true for causes of action and defenses.²⁴¹ A court still must decide what Congress intended a statute to mean, and there are often right, or at least better, answers to such questions.²⁴²

interpretation of positive federal law rather than on open-ended judicial lawmaking." (footnotes omitted)).

²³⁸ Lemos, *supra* note 28, at 444.

²³⁹ See, e.g., Green, *supra* note 11, at 619 (explaining that "[n]o court or scholar has fully resolved" what exactly is meant by common law).

²⁴⁰ Cf. FED. R. EVID. 501 ("[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.").

²⁴¹ See, e.g., Green, *supra* note 11, at 620 (suggesting that if courts read *Erie* as a separation of powers case, "[j]urists who disfavor private litigation might decry common-law causes of action but not common-law defenses, while plaintiff-friendly advocates might prefer the opposite").

²⁴² See, e.g., Alex Kozinski & Fred Bernstein, *Clerkship Politics*, 2 GREEN BAG (2d) 57, 59–60 (1998) ("[i]f [a liberal clerk] and [a conservative federal judge] listed 10 possible arguments in a case, and ranked them from strongest to weakest, [the] rankings would be pretty much the same. I think it's [a judge's] job to pick 1, 2 or 3, even if [he doesn't] like the outcome in 1, 2 or 3. [He] can't skip over them to pick number 9 to get the result [he] like[s]."). Of course, a judge should pick the best reading of the statute, and not the second or third best reading.

Accordingly, it is untrue that *any* ambiguity in a statute is itself a delegation to a court to decide on its own what the best answer is, according to the court's own judgment. A court needs some special authorization from Congress to assume that policymaking power.²⁴³ And if a judge intentionally decides contrary to what Congress has directed under the best reading of a statute, the judge is not somehow creating "federal common law." The judge is just being a bad judge—an unfaithful steward.²⁴⁴ Indeed, if delegated authority to make common law can be unconstitutional because of nondelegation principles, then "federal common law" that is created outside of any plausible delegation from Congress is surely more constitutionally problematic still.²⁴⁵

²⁴³ To be sure, almost every judicial interpretation of a statute can be considered, in some sense, to be common law-making. After all, a judicial opinion might make clear that "X" is covered by a statute, even though the statute does not specifically mention "X" (otherwise, presumably, there would not have been a court case over the issue in the first place). Giving concrete meaning to abstract statutory language may be seen as a form of common law adjudication. So be it. But that does not undermine this Article's central claim that in extraordinary cases a delegation can be too much. In other words, *of course* the line-drawing is hard, which means courts ought to be reticent in doing it, but that does not mean that there is no role for courts at all. Moreover, nondelegation concerns arguably play a role in how a statute ought to be interpreted in the first place. See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 673 (1997) (arguing that textualism best represents nondelegation principles).

²⁴⁴ Related to this point, Professor Green puts weight on statutory canons, arguing that they are judicial creations akin to common law. See Green, *supra* note 11, at 629. He is right—to a point. If as a canon of construction reflects reasonable assumptions about what Congress intended, then they are not necessarily conceptually objectionable, nor do they represent the exercise of delegated authority. "But it is a different question altogether whether a court can modify an otherwise-standard reading of a statute in its pursuit of something else. As put by Justice Scalia, 'Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say?'" Loshin & Nielson, *supra* note 142, at 64 (quoting Scalia, *supra* note 138, at 29). In other words, as a matter of statutory interpretation, it *is* objectionable to create canons of construction which effectuate values apart from those chosen by Congress.

²⁴⁵ Federal common law, of course, is a broad concept. This Article does not explore all its wrinkles. It is enough for purposes here to note that when courts act beyond or outside congressional directive, then constitutional problems arise. See Young, *supra* note 110, at 1642–43 ("Federal common law comes in a number of different forms. Sometimes Congress expressly delegates common lawmaking authority to federal courts Sometimes the delegation is implicit It is just a step beyond this idea of explicit or implicit delegation to say that when Congress leaves gaps in federal statutes—when it fails to specify a measure of damages for new federal claims, for example—it means for the courts to fill in those gaps through federal common lawmaking. . . . In other areas, federal common lawmaking seems to derive simply from the presence of strong federal interests." (footnotes omitted)); *id.* at 1660 (criticizing "federal interest" cases because

A related argument that Professor Green advances is that viewing *Erie* as a separation of powers case does not explain federal enclaves and the like.²⁴⁶ That is a fair point. *Erie* does not answer why federal courts have power to create common law in the admiralty and border dispute contexts, for example, even in the absence of *any* congressional delegation. There are a couple of ways to respond to this objection. First, we can simply side-step it. Admiralty and border disputes are constitutional outliers for reasons independent of *Erie*. As Judge Friendly forcefully argued, “if *all* the grants of judicial power in Article III imply power in the federal courts to make substantive law for their disposition, some rather famous cases may have been wrongly decided.”²⁴⁷ The driving principle of federal jurisdiction is that a jurisdictional grant, *as a general matter*, ought not to be understood as a delegation of lawmaking authority.²⁴⁸ That history has taken a different path in the context of admiralty and border disputes does not mean that diversity jurisdiction must or should go down that path too, especially because *Congress* affirmatively asserted its power over diversity in the Rules of Decision Act, which was enacted in 1789.²⁴⁹

But second, there is a more profound counter-argument to this enclave claim. Why assume that those enclaves are constitutionally permissible? To be sure, the weight of history may be enough alone to justify federal

the policies decisions made by courts are “attributable to Congress only in some extremely attenuated and abstract way”).

²⁴⁶ See, e.g., Green, *supra* note 11, at 620–21 (“The enclave of federal common law governing interstate disputes is nearly universally accepted; admiralty is also highly conventional. The analytical warrant for such exceptions is less clear. Nationalizing interstate disputes and admiralty was a reason for establishing federal courts in the first place. But that does not require federal courts to create substantive law rather than demanding congressional guidance. After all, why should unelected judges, rather than Congress, make law in areas of such vital national importance? And if judicial lawmaking is permissible for interstate litigation and admiralty, why not in other important categories of Article III jurisdiction, like diversity?” (footnotes omitted)).

²⁴⁷ Friendly, *supra* note 36, at 395 (emphasis added) (suggesting as examples: *United States v. Hudson*, 14 U.S. (1 Wheat.) 415 (1816) and *United States v. Coolidge*, 11 U.S. (7 Cranch) 32 (1812)).

²⁴⁸ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 742 (2004) (Scalia, J., concurring) (“The rule against finding a delegation of substantive lawmaking power in a grant of jurisdiction is subject to exceptions, some better established than others. The most firmly entrenched is admiralty law, derived from the grant of admiralty jurisdiction in Article III, § 2, cl. 3, of the Constitution. In the exercise of that jurisdiction federal courts develop and apply a body of general maritime law, ‘the well-known and well-developed venerable law of the sea which arose from the custom among seafaring men.’” (quoting *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999))).

²⁴⁹ Federal Judiciary Act, § 34, 1 Stat. 73, 92 (1789).

enclaves. But to a “Martian,”²⁵⁰ it would seem odd that Courts are making important policy decisions without congressional guidance in *any* context, given that courts are not institutionally designed to create such systemic rules.²⁵¹ Courts, after all, unlike Congress, have limited ability to independently collect facts, and they are not designed to know and weigh the competing interests of different sectors of the economy and Nation. Judicial action also is not subject to the gamut of procedural requirements that are built into Article I. Congress, on the other hand, can collect facts more broadly than courts can and represents the entire Nation, and so is able to evaluate interests in ways that courts cannot. Congress’s ability to exercise those powers, moreover, is also limited by structural constitutional restraints that do not apply to the Judiciary. Though it is beyond the scope of this Article, it is surely worth asking whether the federal Judiciary is the constitutionally appropriate branch to *ever* create such expansive federal common law—at least without clear instructions from Congress to guide them.

IV. *SOSA V. ALVAREZ-MACHAIN* AS NONDELEGATION

If *Erie* is understood as a nondelegation case, then it also offers an attractive explanation for the Supreme Court’s much more recent holding in *Sosa v. Alvarez-Machain*.²⁵² In particular, as demonstrated in the *Benzene Case*, a common judicial move in cases involving delegation to the Executive Branch is to read broad delegations of authority in a narrow fashion to minimize nondelegation concerns.²⁵³ While this practice is controversial and the Supreme Court does not do it consistently due to its textually untethered nature,²⁵⁴ it is clear that the Court attempts to protect nondelegation values through statutory interpretation. With that as the background, *Sosa* can be understood as an example of that same “move,” but in the context of a delegation to the Judiciary. The Court found that the Alien Tort Statute (ATS)²⁵⁵ was an implicit delegation of authority to create causes of action, but then read that implicit delegation much more narrowly than the plaintiff

²⁵⁰ Cf. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles”*, 78 VA. L. REV. 1769, 1770 (1992) (analyzing how law would look to an extraterrestrial visitor).

²⁵¹ Cf. *Patsy v. Bd. of Regents*, 457 U.S. 496, 513 (1982) (noting that Congress has “superior institutional competence to pursue this debate”).

²⁵² 542 U.S. 692 (2004).

²⁵³ See, e.g., Manning, *supra* note 26, at 244–46.

²⁵⁴ See Loshin & Nielson, *supra* note 142, at 45–48.

²⁵⁵ 28 U.S.C. § 1350 (2006).

wished, for reasons that sound in the nondelegation doctrine.²⁵⁶ This application of a common nondelegation move in *Sosa* is significant because *Sosa* is Professor Green's leading example of *Erie* being applied in contexts where it does not belong.²⁵⁷

Sosa is a factually more dreary case than *Erie*. A Drug Enforcement Administration (DEA) agent "was captured on assignment in Mexico and taken to a house in Guadalajara, where he was tortured over the course of a 2-day interrogation, then murdered."²⁵⁸ The DEA believed that "Humberto Alvarez-Machain . . . , a Mexican physician, was present at the house and acted to prolong the agent's life in order to extend the interrogation and torture."²⁵⁹ After negotiations with Mexico failed, the "DEA approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial."²⁶⁰ "[A] group of Mexicans, including . . . Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers."²⁶¹ After various preliminary disputes (which themselves independently ended up before the Supreme Court),²⁶² "[t]he case was tried in 1992, and ended at the close of the Government's case, when the District Court granted Alvarez's motion for a judgment of acquittal."²⁶³

Back in Mexico, Alvarez sued "Sosa under the ATS, for a violation of the law of nations."²⁶⁴ The Alien Tort Statute, also enacted in 1789 as part of the First Judiciary Act, provides in its entirety that "[t]he district courts shall

²⁵⁶ See *Sosa*, 542 U.S. at 732 ("[For various reasons dealing with the institutional role of the courts,] we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.").

²⁵⁷ See Green, *supra* note 11, at 598 ("One example of *Erie*'s overgrowth concerns the judicial application of customary international law under the Alien Tort Statute (ATS). In *Sosa v. Alvarez-Machain*, *Erie* was a touchstone of the Court's ATS analysis, and not one Justice questioned *Erie*'s relevance. What *Sosa* inadequately explained, however, is why *Erie*, a 1938 decision about choice of law in diversity suits, should affect the interpretation of a 1789 statute concerning torts based on international law." (footnotes omitted)); see also *id.* at 643 ("Thus, if [advocates for the proposition that *Erie* imposes constitutional limits on federal common law] would use *Erie* to overthrow the ATS's original meaning, they need a constitutional hook for their separation-of-powers narrative, and that constitutional basis seems quite hard to find.").

²⁵⁸ *Sosa*, 542 U.S. at 697.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 698.

²⁶¹ *Id.*

²⁶² See *United States v. Alvarez-Machain*, 504 U.S. 655, 656–58 (1992).

²⁶³ *Sosa*, 542 U.S. at 698.

²⁶⁴ *Id.*

have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁶⁵ The lower courts agreed that the Alien Tort Statute supported Alvarez’s claims. The Supreme Court granted certiorari and reversed. The Court was unanimous that *Sosa*’s argument could not proceed, but was split on the reasoning.

Justice Souter wrote for the majority. Following upon Judge Friendly’s earlier characterization, Souter explained that the Alien Tort Statute is “a ‘legal Lohengrin’; ‘no one seems to know whence it came,’ and for over 170 years after its enactment it provided jurisdiction in only one case.”²⁶⁶ The majority concluded, however, that while the Alien Tort Statute speaks only of jurisdiction, Congress did not intend it to be stillborn, for “torts in violation of the law of nations would have been recognized within the common law of the time.”²⁶⁷ According to the majority, Congress implicitly authorized the federal courts to recognize these causes of action.²⁶⁸

In particular, based on the scanty history of the Alien Tort Statute and its own intuition, the *Sosa* Court reasoned:

[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners. The anxieties of the preconstitutional period cannot be ignored easily enough to think that the statute was not meant to have a practical effect. Consider that the principal draftsman of the ATS was apparently Oliver Ellsworth, previously a member of the Continental Congress that had passed the 1781 resolution and a member of the Connecticut Legislature that made good on that congressional request. Consider, too, that the First Congress was attentive enough to the law of nations to recognize certain offenses expressly as criminal It would have been passing strange for Ellsworth and this very Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action. There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.²⁶⁹

²⁶⁵ 28 U.S.C. § 1350 (2006).

²⁶⁶ *Sosa*, 542 U.S. at 712 (citation omitted) (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)).

²⁶⁷ *Id.* at 714.

²⁶⁸ *Id.* at 720.

²⁶⁹ *Id.* at 719 (footnote omitted) (citation omitted).

This looked like a victory for the plaintiff. If the Alien Tort Statute implicitly allows courts to create common law causes of action, then presumably federal courts would be open to a case like Alvarez's. Justice Souter, however, closed that door.²⁷⁰ Even after acknowledging that the Alien Tort Statute is more than just a jurisdictional grant, "[Justice] Souter rejected the . . . position that all customary international law is automatically enforceable in federal court."²⁷¹ Instead, he stated that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized";²⁷² in other words, "violation of safe conducts, infringement of ambassadors' rights, and piracy."²⁷³

Justice Souter's reasoning for giving with one hand but taking with the other deserves careful attention. The *Sosa* Court noted that in 1789, "the common law appears to have . . . assumed only a very limited set of claims."²⁷⁴ Moreover, citing Blackstone, the Court noted that in 1789, "'offences against this law [of nations] [were] principally incident to whole states or nations,' and not individuals seeking relief in court."²⁷⁵

But what about the fact that the causes of action which the Court did acknowledge under the Alien Tort Statute were not statutory, but instead were common law in character? If Congress in 1789 implicitly authorized federal courts to recognize causes of action using common law methods, why is the holding in *Sosa* so limited? To answer that question, Justice Souter turned to *Erie*. He first noted that "the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms."²⁷⁶ After all, "[w]hen [the statute] was enacted, the accepted conception was of the common law as 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,'" but "[n]ow, however, in most cases where a court is asked to state or formulate a common law principle in

²⁷⁰ See, e.g., Green, *supra* note 11, at 637–39 (explaining how *Sosa*'s majority opinion produced a "middle-ground result").

²⁷¹ *Id.* at 636.

²⁷² *Sosa*, 542 U.S. at 725.

²⁷³ See Green, *supra* note 11, at 638.

²⁷⁴ *Sosa*, 542 U.S. at 720.

²⁷⁵ *Id.* (first alteration in original) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *68).

²⁷⁶ *Id.* at 725.

a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.”²⁷⁷

Moreover, “along with, and in part driven by, that conceptual development in understanding common law has come an equally significant rethinking of the role of the federal courts in making it.”²⁷⁸ After *Erie*, there is no “‘general’ common law,” and while Congress has authorized some areas of federal common law (such as the creation of “evidentiary privileges in federal-question cases”) or the Court has created “interstitial” law, “the general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.”²⁷⁹ Thus, “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.”²⁸⁰

Likewise, “[w]hile the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.”²⁸¹ “[M]odern international law” is more concerned with “claim[s] [to] limit . . . the power of foreign governments over their own citizens[] and to hold that a foreign government or its agent has transgressed those limits.”²⁸² This means recognizing novel causes of action under the Alien Tort Statute risks “impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”²⁸³ Finally, federal courts “have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.”²⁸⁴

²⁷⁷ *Id.* (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

²⁷⁸ *Id.* at 726.

²⁷⁹ *Id.* (citing, *inter alia*, FED. R. EVID. 501).

²⁸⁰ *Sosa*, 542 U.S. at 727.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 728. Justice Scalia would have gone further still. According to him, the Alien Tort Statute must be understood as *only* a jurisdictional grant, and federal courts cannot create common law causes for it—particularly after *Erie*. Scalia explained that *Erie* changed everything:

Unlike the general common law that preceded it, however, federal common law [today is] self-consciously “made” rather than “discovered,” by judges who [seek] to avoid falling under the sway of (in Holmes’s hyperbolic language) “[t]he fallacy and

Professor Green criticizes the *Sosa* opinion for not explaining “why *Erie* should merit a pivotal role in applying customary international law under the ATS. *Erie* postdates the statute by almost one hundred fifty years, and Brandeis’s opinion does not reference customary international law, much less the ATS.”²⁸⁵ But nonetheless, “[a]lthough Tompkins’s negligence action obviously differed from Alvarez-Machain’s human rights suit, [*Sosa*] views both as somehow analogous forms of judicial lawmaking that deserve uniform, categorical suspicion.”²⁸⁶ Moreover, Professor Green observes that:

The *Sosa* majority’s “definition” and “acceptance” standards reveal an internal tension. The urge to suppress ATS litigation stems from . . . resistance to federal common law. Yet courts must use *distinctively common-law methods* to identify which tort actions the ATS allows. The Court’s “definiteness” and “acceptance” standards have no support in the ATS’s text or legislative history; such tests emerged from a canvass of United States history and an evaluation of ATS litigation’s “practical consequences.” Likewise, courts applying *Sosa*’s doctrinal test will have only judicial precedents as guideposts and will almost inevitably produce flexible, case-by-case judgments. From a functional viewpoint, this looks much like the unguided, common-law policymaking that [supposedly] raises separation-of-powers concerns²⁸⁷

illusion” that there exists “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”

Id. at 741 (Scalia, J., concurring) (third alteration in original) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). Thus, post-*Erie*, “federal common law (in the sense of judicially pronounced law) [is limited to] a ‘few and restricted’ areas in which ‘a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law.’” *Id.* (Scalia, J., concurring) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)). Accordingly, in this new post-*Erie* world, it cannot be that federal courts have the power to simply create new causes of action for the Alien Tort Statute. *See, e.g., id.* at 741–42 (Scalia, J., concurring) (“The general rule . . . is that ‘[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law.’ This rule applies not only to applications of federal common law that would displace a state rule, but also to applications that simply create a private cause of action under a federal statute.” (alteration in original)). Therefore, the Court should not recognize *any* causes of action under it: “[C]ourts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law.” *Id.* at 747 (Scalia, J., concurring). Because Justice Souter’s majority opinion is the law, this Article will focus on it.

²⁸⁵ Green, *supra* note 11, at 637–38.

²⁸⁶ *Id.* at 638.

²⁸⁷ *Id.* at 638–39 (footnote omitted).

Professor Green's objections are met, in large part, by the nondelegation doctrine. For instance, it is wholly beside the point that "*Erie* postdates the [Alien Tort Statute] by almost one hundred fifty years."²⁸⁸ *Erie* is properly a constitutional decision, given the nondelegation doctrine, and the Constitution supersedes the Alien Tort Statute. And while it is true that Justice Brandeis did not "reference customary international law, much less the ATS,"²⁸⁹ *Erie*'s constitutional footing—the nondelegation doctrine—is not limited to the diversity context. Likewise, both the Alien Tort Statute and the Rules of Decision Act, which were both included in the Judiciary Act of 1789,²⁹⁰ can be interpreted as broad delegations to the courts.²⁹¹ If the Alien Tort Statute was intended as such, then it is unsurprising that the Court adopted a narrow construction of it to avoid nondelegation concerns. The Court does that *all the time* in nondelegation cases.²⁹² Thus, the Alien Tort Statute and the Rules of Decision Act *are* "analogous forms of judicial lawmaking that deserve uniform, categorical suspicion."²⁹³

Professor Green is right, however, to recognize the "tension" in Justice Souter's approach—which is one point to favor Justice Scalia's bright-line rule.²⁹⁴ But after rejecting Scalia's approach, the *Sosa* Court felt that it needed to find some way to limit the scope of the delegation. After all, if the Alien Tort Statute is conceptualized as an implicit delegation of authority to federal courts to create common law causes of action for unspecified customary international law disputes, then it poses profound nondelegation concerns—the most obvious being that under this conception of the Alien Tort Statute, there is no intelligible principle to guide the federal courts. That is problematic under *Panama Refining*, which requires an "intelligible principle" in the statute itself.²⁹⁵

Justice Souter's majority opinion hints at this *Panama Refining* problem. He explained first that "the general practice has been to look for legislative

²⁸⁸ *Id.* at 638.

²⁸⁹ *Id.*

²⁹⁰ Federal Judiciary Act, § 9, 1 Stat. 73, 76 (1789) (Alien Tort Statute); *id.* § 34, 1 Stat. at 92 (Rules of Decision Act).

²⁹¹ To be clear, this Article takes the view that, as an initial matter, *neither* statute should be read as a delegation because neither text makes such a delegation. The *Swift* Court, however, read the Rules of Decision Act as an implicit delegation. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842). Likewise, the *Sosa* majority also understood the Alien Tort Statute to be an implicit delegation, but then read the delegation narrowly. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). This Article assumes *arguendo* that the *Sosa* majority was correct to find an implicit delegation.

²⁹² *See supra* Part III.A.4.

²⁹³ Green, *supra* note 11, at 638.

²⁹⁴ *See supra* note 284.

²⁹⁵ *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 429–30 (1935).

guidance before exercising innovative authority over substantive law,” and second that “[w]e have no congressional mandate to seek out and define new and debatable violations of the law of nations.”²⁹⁶ Both of these statements suggest that the *Sosa* Court was concerned that there was no intelligible principle in the Alien Tort Statute. When faced with a statute that does not present an intelligible principle, it is a common move in nondelegation cases for the Court itself to rummage about for one.²⁹⁷ The *Sosa* majority thus found an intelligible principle in the Act’s structure and history. Hence, “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”²⁹⁸

There are also shadows of *Schechter Poultry* in *Sosa*. Though the Alien Tort Statute does not have the same sort of domestic economic effect as the National Industrial Recovery Act did, the Alien Tort Statute nonetheless involves exceptionally important policy considerations of a sort that courts ought to avoid. As Justice Souter explained, the Alien Tort Statute, if read expansively, may have “potential implications for the foreign relations of the United States,” and this “should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”²⁹⁹ Indeed, courts have no place, at least without clear and detailed instructions, “to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.”³⁰⁰ Congress cannot delegate that sort of foreign affairs power to the federal Judiciary without a much more explicit principle that narrows the scope of the delegation.

²⁹⁶ *Sosa*, 542 U.S. at 726, 728.

²⁹⁷ *E.g.*, *Indus. Union Dept. v. Am. Petroleum Inst. (Benzene Case)*, 448 U.S. 607, 682 (1980) (Rehnquist, J., concurring) (“In prior cases this Court has looked to sources other than the legislative history to breathe life into otherwise vague delegations of legislative power. In *American Power & Light Co. v. SEC*, for example, this Court concluded that certain seemingly vague delegations ‘derive[d] much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.’” (alteration in original) (emphasis added) (citation omitted) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946))); Manning, *supra* note 26, at 244–46.

²⁹⁸ *Sosa*, 542 U.S. at 725.

²⁹⁹ *Id.* at 727.

³⁰⁰ *Id.*

V. *ERIE* AND THE SHERMAN ACT

As explained, *Erie*—properly understood—is precedent for the proposition that the nondelegation doctrine applies to the Judicial Branch too. The Supreme Court thus has rightly extended *Erie* beyond the diversity jurisdiction context, such as in *Sosa*. But the Court perhaps has not gone far enough; there may be other areas of law where *Erie* as a nondelegation decision could be extended. In particular, the nondelegation doctrine arguably should also be applied in the antitrust context. Scholars have recognized the potential conceptual difficulty inherent in judicial administration of the antitrust statutes, but they have not identified a signature case where the nondelegation doctrine has been used to curtail the exercise of such delegated power. *Erie* may be that signature case.

Like *Swift*, antitrust arguably represents another instance where economic policy is left “in judicial hands.”³⁰¹ The Sherman Act, however, has not been struck down or even limited on nondelegation grounds. Thus, one might argue that *Erie* cannot be a nondelegation case because *Swift*’s interpretation of the Rules of Decision Act was no more expansive or unrestrained than are the Sherman Act and the other antitrust statutes. There are a couple of responses to this argument. First, it is not true; *Swift* was much broader than the Sherman Act. But second, and more importantly, this reasoning may get it exactly backwards. Far from proving that *Erie* cannot be a nondelegation case, this analysis might show why the antitrust laws may be constitutionally problematic, at least in some applications.³⁰²

We start again on familiar grounds. The Sherman Act outlaws “[e]very contract, combination . . . , or conspiracy, in restraint of trade or

³⁰¹ Green, *supra* note 11, at 619.

³⁰² This argument is against interest. The federal courts, by and large, have done a “good job” with antitrust law—especially after Bork. *E.g.*, Thomas G. Krattenmaker, *Responses*, 29 CONN. L. REV. 373, 390 n.43 (1996) (“Antitrust judges have done a remarkably good job of fashioning legal rules to protect competitive markets and restrict anti-competitive practices. The judges do not, however, perform this work without exercising discretion”); *see infra* note 301. But principles are not worth much if we only follow them when they lead us to the result that we would like to reach anyway!

It also is worth noting that the Federal Trade Commission Act, which of course is a delegation to an executive agency, is also quite broad. *See* 15 U.S.C. § 45(a)(2) (2006) (“The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”). The question then is whether this too might be constitutionally problematic. It may be—though I concede that the Supreme Court has been reluctant to strike down delegations to the Executive Branch. As explained above, moreover, there are reasons why courts should judge delegations to the Judiciary more harshly than delegations to an executive agency. *See supra* Part III.A.1.

commerce.”³⁰³ From these few words, “the courts have created *per se* rules against price-fixing, tying, horizontal boycotts, and market allocation agreements, while the less rigid ‘rule of reason’ applies to covenants not to compete, group bidding arrangements, and collective advertising restrictions.”³⁰⁴ The statute, as interpreted, is more complicated still because “[t]he line between [per se rules and rules of reason] is far from clear or stable, although it ostensibly reflects the fuzzy common law that the Sherman Act federalized.”³⁰⁵

Antitrust thus presents a paradox—but not necessarily the one that Judge Bork so famously identified.³⁰⁶ Under *Erie*, “federal courts lack the constitutional power to promulgate substantive rules of decision in common-law cases,” but “while federal courts lack the constitutional power to alter the common law meanings of *contract* and *breach*, they nonetheless possess the power to define—and redefine—the terms of a ‘[reasonable] contract’ under the Sherman Act.”³⁰⁷ This paradox can be problematic to understanding *Erie* as a nondelegation case. But as a matter of law and logic, it need not be. A paradox can be resolved in more than one way. Instead of the Sherman Act creating problems for this Article’s analysis of *Erie*, the better understanding perhaps is that because *Erie* is a nondelegation case, it is the Sherman Act that arguably may pose constitutional concerns in certain applications.

There is some reason to believe that the Sherman Act may be in tension with the nondelegation doctrine.³⁰⁸ Indeed, Andrew Oldham has gone so far as to say “the Sherman Act invites naked judicial lawmaking,” and “Article I,

³⁰³ 15 U.S.C. § 1 (2006).

³⁰⁴ Oldham, *supra* note 28, at 320 (footnotes omitted).

³⁰⁵ *Id.* (footnotes omitted).

³⁰⁶ See ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 7 (1978) (arguing that antitrust’s “paradox” is that aggressive enforcement of antitrust law may actually harm consumers).

³⁰⁷ Oldham, *supra* note 28, at 322–23 (alteration in original) (footnotes omitted). In fact, the paradox runs deeper still: Many who oppose common law adjudication in the federal courts “nonetheless turn a blind eye toward—or even *celebrate*—judges who assume common lawmaking powers over American commerce via the antitrust laws.” *Id.* at 322 (footnotes omitted) (citing BORK, *supra* note 306, at 72); see also *id.* at 346 (“[T]he Sherman Act’s most ardent theorists debate the most economically efficient way to give meaning to its vacuous language while simultaneously arguing that judges should refuse to fill gaps that Congress has left in other statutes.” (footnote omitted)).

³⁰⁸ See Lemos, *supra* note 28, at 464 (“When held up against the arguments that have been offered in praise of delegations to agencies, however, the Sherman Act’s delegation to courts seems problematic at best.”); Oldham, *supra* note 28, at 346 (“The more persuasive view is that Congress cannot deputize the federal courts—and federal judges cannot accept such congressional delegation—to make standardless policy judgments, regardless of whether the case addresses competition law.” (footnote omitted)).

not Article III, is the constitutionally required repository for antitrust lawmaking power.”³⁰⁹ At a minimum, “[v]iewing antitrust from the perspective of the nondelegation doctrine brings one face to face with the central difficulty that generalist judges, proceeding on a case-by-case basis with the assistance of lay juries, seem particularly ill-suited to developing and applying rules to govern this increasingly technical field.”³¹⁰ Thus, “[i]t seems clear that if the nondelegation doctrine were enforced against delegations to courts, the Sherman Act would be a likely candidate for constitutional invalidation.”³¹¹

Indeed, the “meandering” development of the antitrust laws³¹² may be questionable under both *Panama Refining* and *Schechter Poultry*. As to

³⁰⁹ Oldham, *supra* note 28, at 344, 351.

³¹⁰ Lemos, *supra* note 28, at 468. It also bears noting that the more complicated antitrust law becomes, the less competent courts are to make it:

Antitrust is a highly technical field, shot through with difficult and contested questions of economic theory. The Court has acknowledged that “courts are of limited utility in examining difficult economic problems.” Driven in part by that recognition, the Court initially crafted antitrust law in the form of per se rules prohibiting or protecting certain conduct. Such rules were easy to administer, but they suffered from the predictable problems of under- and overinclusiveness. Recent years have seen a movement away from per se rules and toward more flexible standards that allow judges to consider the challenged conduct in context to determine whether it appears to be an unreasonable restraint of trade. Yet the more nuanced and complex antitrust law becomes, the farther it drifts from the ken of the average federal judge. For example, a frequent problem in antitrust cases is identifying and ruling out alternative explanations for seemingly anticompetitive conduct. That is a difficult task even for economists, but it is worse for generalist judges, who tend to lack the expertise and fact-finding capacities of specialists. Indeed, “there is relatively little disagreement about the basic proposition that often our general judicial system is not competent to apply the economic theory necessary for identifying strategic behavior as anticompetitive.”

Id. at 464–65 (footnotes omitted) (quoting *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 609 (1972)). Professor Lemos finds these institutional factors relevant in her pragmatic assessment of the separation of powers. *See, e.g., id.* at 468 (suggesting that antitrust should be entrusted to “a specialized agency”).

³¹¹ *See id.* at 464.

³¹² Oldham, *supra* note 28, at 335; *see also* *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 129 S. Ct. 1109, 1120 n.3 (2009) (limiting the scope of Judge Hand’s *Alcoa* decision based on more recent “developments in economic theory and antitrust jurisprudence”); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881–82 (2007) (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)); Oldham, *supra* note 28, at 336 (“[T]he federal courts have repeatedly tweaked the Sherman Act despite Congress’s silence. For example, in *Standard Oil Co. of New Jersey v. United States*, Chief Justice White held that Standard Oil had violated the Sherman Act because it had engaged in a variety of predatory practices against competitors. By 1945, however, . . . Judge Hand held that *Alcoa* had violated section 2 of

Panama Refining, it is altogether unclear what “intelligible principle” Congress intended to drive antitrust. Instead, “[t]he story of modern antitrust law is the story of the *courts*’ efforts to settle on an intelligible principle of *their own choosing*. The fact that the courts have flip-flopped in their efforts to find such a principle—despite the unchanged text of the statute—highlights the fact that they are blatantly exercising lawmaking powers.”³¹³ Though the antitrust laws are often interpreted with an eye towards advancing consumer welfare, that intelligible principle is not announced in the text or history of the Sherman Act, and there is reason to think that other purposes have an equal claim to preeminence.³¹⁴ In fact,

[i]f anything can be gleaned from the text of the statute and what we know of its genesis, it is that Congress did not purport to resolve the many difficult puzzles of antitrust itself. Congress opted instead for “regulation by lawsuit,” leaving it to the courts to strike the appropriate balance between competition and collusion.³¹⁵

the Sherman Act, even though it was not accused of predatory conduct. Some thirty years later the tide once again shifted, and the law required a showing of anticompetitive conduct as a prerequisite to a successful monopolization claim.” (footnotes omitted)).

³¹³ Oldham, *supra* note 28, at 351–52 (second emphasis added) (footnotes omitted). Professor Lemos notes:

The choices left to courts, moreover, are not interstitial or technical; they are foundational. Courts, not Congress, have given content to the core concept of “competition”—thereby defining what the goal of antitrust law is and should be. In the 1960s and 1970s, the Court conceived of competition in terms of small business versus big business, and crafted antitrust rules with a view toward facilitating competition between those groups (even if the result was higher prices and less desirable products). Due in large part to the theoretical influence of the Chicago School, antitrust law underwent a “counterrevolution” in the 1970s and 1980s, resulting in a new conception of competition that focuses on “the economic coin of low prices, high output, and maximum room for innovation.”

Lemos, *supra* note 28, at 463 (footnotes omitted) (quoting HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 2 (2005)).

³¹⁴ See, e.g., Oldham, *supra* note 28, at 351 n.208 (collecting authorities that say the purpose of the antitrust laws is economic efficiency and competing authorities that say otherwise).

³¹⁵ Lemos, *supra* note 28, at 462–63 (quoting 9 ALEXANDER BICKEL & BENNO C. SCHMIDT, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT* 1910–21, at 130 (1984)).

Thus, “[t]he result is a statute ‘so open textured . . . that any standard the Court adopts is ultimately a judicial creation.’”³¹⁶ This may present a *Panama Refining* problem.

There may be *Schechter Poultry* problems too. The power to create antitrust law is the power to regulate much of the economy. Using the antitrust laws, a federal court arguably can make almost any major economic transaction illegal, even those with very little probability of harming consumers. For instance, in *Brown Shoe Co. v. United States*, a Clayton Act³¹⁷ case, a merger was blocked between the third- and eighth-largest shoe makers.³¹⁸ It is hard to see how a merger like this could have harmed consumers. As Judge Posner has explained, *Brown Shoe* “seemed . . . to establish the illegality of *any* nontrivial acquisition of a competitor, *whether or not the acquisition was likely either to bring about or shore up collusive or oligopoly pricing*,” because, “[t]he elimination of a significant rival was thought by itself to infringe the complex of social and economic values conceived by a majority of the Court to inform [the antitrust laws].”³¹⁹ Such expansive authority over the American economy arguably is in real tension with the holding in *Schechter Poultry*.

Because *Erie*, rightly understood, holds that the nondelegation doctrine can apply when federal courts (and not just executive agencies) are Congress’s delegate, the antitrust laws may be constitutionally suspect, at least in some applications. Consistent with the nondelegation doctrine, courts arguably are the wrong branch of government to create “‘the Magna Carta of free enterprise’ or the ‘charter of economic liberty.’”³²⁰ Congress should step in and decide what is lawful and what is not, especially for complex and controverted economic issues such as monopolization by below-cost pricing and the like.³²¹ Put simply, while “[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such

³¹⁶ *Id.* at 463 (alteration in original) (quoting William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 659).

³¹⁷ Clayton Act, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 18 (2006)).

³¹⁸ *See Brown Shoe Co. v. United States*, 370 U.S. 294, 297 (1962).

³¹⁹ *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1385 (7th Cir. 1986) (emphasis added).

³²⁰ Oldham, *supra* note 28, at 344–45 (footnote omitted) (quoting *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972); *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958)).

³²¹ *See, e.g., LePage’s Inc. v. 3M (Minn. Mining & Mfg. Co.)*, 324 F.3d 141, 144 (3d Cir. 2003) (en banc) (addressing below-cost pricing and bundled rebates).

general provisions to fill up the details,”³²² wholesale creation of a complex code to govern the Nation’s economic relationships arguably is more than just detail-filling. Accordingly, building upon *Erie* and *Sosa*, the nondelegation doctrine potentially should be applied in the antitrust context too.³²³

VI. CONCLUSION

Erie is an iconic case. It matters. No lawyer worth the title does not know *Erie*’s black-letter rule by heart, and it is hard for modern lawyers to imagine diversity jurisdiction without the *Erie* doctrine. Indeed, as Justice Black put it, *Erie* is “one of the most important cases at law in American legal history.”³²⁴ Justice Brandeis’s pen changed the course of constitutional law forever. Unfortunately, he did a poor job explaining *why Swift* had to go.

Erie’s constitutional basis must lie in the separation of powers. But not all separation of powers arguments are created equal. A separation of powers argument such as “federal courts cannot make common law” is much too categorical. Instead, the reason why *Swift*’s interpretation of the Rules of Decision Act was unconstitutional is that Congress cannot make such an expansive and unchanneled delegation of authority to federal courts under the nondelegation doctrine. Even if Congress had meant to make that delegation in the Rules of Decision Act, the Constitution stood in the way. Congress’s power to hand off authority to another branch—be it the Executive or Judicial—is not endless. The line is not easy to draw, but there is one. And *Swift* crossed it.

Reading *Erie* as a nondelegation case makes sense. The grant of authority that the *Swift* Court inferred from the Rules of Decision Act was both expansive and undirected. Almost the whole of commercial law being handed over to unelected federal judges? With no congressional guidance at all? When one steps back and looks at what *Swift* actually meant, it is clear that such a sprawling delegation of policy-making power runs headlong into

³²² *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

³²³ This is not to say that at this late date, *all* of antitrust is problematic. For instance, the law on hardcore price-fixing is firmly settled. *See, e.g.*, Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127, 144 (2009) (explaining that for “cartel enforcement . . . the harm is obvious, and the cases generally do not raise (or the defendants are not permitted to raise) efficiency claims that make possible a calculation of the social benefits to weigh against the social harm”). There is little reason to upset such a black-letter rule. This arguably is not necessarily true, however, for other antitrust doctrines where policy is still being made. This Article takes no position on the question of the constitutionality of the antitrust laws, an extraordinarily complicated question, but merely notes that there *may be* a question, which itself is important.

³²⁴ Hugo L. Black, *Address*, 13 MO. B.J. 173, 174 (1942).

Schechter Poultry and *Panama Refining*—two cases decided shortly before *Erie* and by almost an identical Supreme Court. While most statutes delegating authority will not raise serious nondelegation concerns, regardless of whether they authorize agencies or courts to make law, truly extraordinary delegations cannot be allowed to stand. Congress has broad discretion in this field, but precedent is plain that the power to delegate is not endless.

Sosa can be classified as a nondelegation case too. A broad reading of the Alien Tort Statute would have presented profound nondelegation problems by putting federal courts in the improper role of making important policy decisions without any legislative guidance. The takeaway point is simple: If Congress wants federal courts to apply customary international law, then Congress needs to tell the federal courts how to do that—with specificity. Likewise, given *Erie*'s nondelegation holding, the antitrust laws arguably are also problematic, at least in some applications. It may be Congress alone which should create federal law to undergird the Nation's antitrust regime.

In the end, this Article raises one fundamental question: If Congress were to enact a statute giving the Executive Branch authority to promulgate rules of decision to govern diversity cases where no state statute is on point, would not that delegation conflict with *Schechter Poultry* and *Panama Refining*? Because the answer must be yes, *Erie* sits well as a nondelegation decision, and should be placed alongside *Schechter Poultry* and *Panama Refining* in the nondelegation canon. The nondelegation doctrine is based on the fundamental notion that under our Constitution, Congress must make important policy decisions and cannot deputize any other branch of government into that role. That simple but profound truth solidifies *Erie*'s place in constitutional law.